

**Response to  
the Legal Services Commission's Consultation Paper  
'The Use of Experts'**

**Prepared by  
the *UK Register of Expert Witnesses***

Dr Chris Pamplin  
Editor  
UK Register of Expert Witnesses  
11 Kings Court  
Newmarket  
CB8 7SG  
Tel: 01638 561590  
email: [editor@jspubs.com](mailto:editor@jspubs.com)

## Response to LSC Consultation

---

## Response to LSC Consultation

<b>Executive Summary .....</b>	<b>5</b>
Quality .....	5
Price .....	6
Procedures .....	6
Summary .....	6
<b>Introduction .....</b>	<b>7</b>
<b>Quality .....</b>	<b>9</b>
<b>Is there a need for improved quality? .....</b>	<b>9</b>
The civil arena .....	9
The criminal arena .....	10
Leading-edge science .....	11
Conclusion .....	12
<b>Quality assurance .....</b>	<b>12</b>
Feasibility – what to accredit .....	13
Professional bodies .....	13
The lesson of Michael Wilkey .....	14
The attributes of an accrediting body .....	15
The lesson of Barion Baluchi .....	17
Conclusion .....	18
<b>Science in the courtroom .....</b>	<b>19</b>
Understanding the problem .....	19
Accept the Courts bear much of the blame .....	19
Take the expert out of the courtroom .....	20
<b>Price .....</b>	<b>23</b>
<b>Inflationary factors affecting expert witness fees .....</b>	<b>24</b>
How CPR has caused expert witness costs to increase .....	24
How MROs have caused expert witness costs to increase .....	25
<b>How top quality experts can save money .....</b>	<b>26</b>
<b>Fee bands .....</b>	<b>27</b>
<b>Proportionality .....</b>	<b>28</b>
Staged instructions .....	28
<b>Conclusion .....</b>	<b>28</b>
Highlighting entries in the UK Register of Expert Witnesses .....	29
<b>Procedures .....</b>	<b>31</b>
<b>Removal of prior authority .....</b>	<b>31</b>
An alternative: staged instruction .....	31
LSC-specific Terms of Engagement .....	31
<b>Impacts on supply, competition, small businesses .....</b>	<b>33</b>
The small firms' impact test .....	33
Competition assessment .....	33
<b>Answers to the Specific Questions .....</b>	<b>35</b>
<b>Annex 1: Experts' answers to the specific question .....</b>	<b>41</b>
<b>Answers .....</b>	<b>41</b>
<b>The Respondents .....</b>	<b>71</b>
<b>Annex 2: Polling results .....</b>	<b>73</b>
<b>Work profile of the contributors .....</b>	<b>73</b>
<b>Results .....</b>	<b>73</b>
<b>Contributors .....</b>	<b>74</b>
<b>Annex 3: Correspondence .....</b>	<b>75</b>
<b>Correspondence received by e-mail .....</b>	<b>75</b>
<b>Correspondence received by post .....</b>	<b>91</b>

## Response to LSC Consultation

---

## Response to LSC Consultation

### Executive Summary

---

## Executive Summary

This is the response of the *UK Register of Expert Witnesses* to 'The Use of Experts' Consultation Paper issued by the LSC on 25 November 2004. It draws together contributions from 238 expert witnesses listed in the *Register*.

### 5 Quality

The LSC's principal proposal on quality (proposal 2.2) is predicated on two assumptions:

- there is a problem with the current quality of expert evidence;
- CRFP accreditation is capable of delivering quality assurance.

We believe, and over 80% of our expert contributors agree, that both assumptions are wrong.

10 The LSC offers no evidence in support of the first of these assumptions. Furthermore, the high-profile problems in the criminal courts, which have been popularly ascribed to the failings of expert witnesses, have actually, according to the Court of Appeal (*R -v- Cannings* [2004] *EWCA Crim 1*), reflected a failing in the way the courts have handled conflicting scientific evidence. This is a view supported by 81% of our expert contributors.

15 Even if there was a general problem with the quality of expert evidence, we reject the proposition that the CRFP accreditation scheme would be able to remedy the situation by delivering "quality assured" experts. Quality assurance can only come from looking carefully at each expert, in each case and from many angles. And that's precisely the system already in place in the form of the lawyers, the judge and the other expert witnesses in a case. Perhaps this is the reason why 83%  
20 of our expert contributors agree that the current quality assurance system is the best way of ensuring competence amongst expert witnesses.

Implicit in the approach adopted by the LSC is the assumption that the skills of the expert witness, as opposed to those of the expert, are susceptible to accreditation. We disagree with this assumption. What is there in a person's ability to form an opinion and bear witness to it that is  
25 susceptible to meaningful accreditation? The basic skills specific to report writing and the giving of evidence are really not that onerous, and are easily acquired through training, although experience is a better tutor.

Insofar as an individual's competence as an expert might be in need of accreditation, this is a task best performed by the expert's professional body. Such bodies will generally already have

## Response to LSC Consultation

### Executive Summary

---

the disciplinary powers in place to deal with an expert whose expertise is found to be below some defined standard.

### Price

5 The proposals on fees – based, as they are, on guesswork – fail to arrive at a convincing analysis of the current position. We provide evidence from our own bi-annual surveys of expert witnesses that fees have increased by less than 10% above the rate of inflation since 1997.

10 From such poor groundwork, the LSC has arrived at proposals that carry with them a significant danger of reducing the pool, and overall quality, of experts willing to work in publicly-funded cases. This negative effect is likely to be most acute for the CLS. Indeed, we predict a serious impact on supply and competition within the expert witness marketplace for civil cases if the ‘meagre’ fee scales on offer in the criminal arena are imposed on expert witnesses in the civil arena. This prediction is supported by 92% of our expert contributors.

15 We identify a number of inflationary pressures flowing from the Access to Justice Act 1999, and offer suggestions involving a staged approach to the instruction of experts for how the effects of these pressures can be ameliorated.

### Procedures

20 Whilst appreciating the difficulties of assessing applications for prior authorities, we consider its removal would have a serious impact on the supply of expert witnesses, a view endorsed by 82% of our expert contributors. We suggest that a staged approach to the instruction of experts would offer a way for the LSC to make more informed decisions on applications for prior authority.

We welcome, as do 89% of our expert contributors, any pressure the LSC can bring to ensure expert witnesses adopt clear, written terms of engagement. However, we, together with 85% of our expert contributors, do not consider it appropriate for the LSC to impose mandatory clauses in those terms of engagement.

### Summary

25 The nature of the key proposals on accreditation, fees and procedures leaves little doubt that the main driving force behind the consultation paper is financial. If implemented, these changes will act to reduce access to justice to the most vulnerable in Society. We make a number of suggestions for procedural changes that may help to contain costs whilst protecting access to justice.

## Response to LSC Consultation

### Introduction

---

## Introduction

This is the response of the *UK Register of Expert Witnesses* to 'The Use of Experts' Consultation Paper issued by the LSC on 25 November 2004. The first draft of this response was posted on the *Register's* website (<http://www.jspubs.com>) in early December 2004. The 3,000 experts in the *Register* were then invited to consider the response and feed back their own views. We also enabled experts to contribute by lending their support to, or record their rejection of, the views contained in our initial response through an on-line polling system.

Overall, 190 expert witnesses registered their views through the polling system, 16 experts provided answers to the specific questions and 22 experts sent written responses.

J S Publications has published the *UK Register of Expert Witnesses* since 1988. The *Register* has developed over the years from a simple directory publishing project into a support organisation for expert witnesses. Most of our time is now spent on the professional support and education of expert witnesses.

Perhaps the most important feature of the *UK Register of Expert Witnesses* is the vetting we've undertaken since the product's inception way back in 1988. Indeed, our many conversations with lawyers have highlighted the importance they place on knowing that listed experts are vetted. In the past year we have introduced re-vetting. Now, all experts have the opportunity to submit to regular scrutiny by instructing lawyers in a number of key areas, such as report writing, oral evidence and performance under cross-examination. The results of the re-vetting process are published in the printed *Register*, in the software and on-line.

The printed *Register* is distributed free of charge to a controlled list of around 10,000 selected litigation lawyers. The on-line version of the *Register* is also available free to anyone with an Internet connection, and currently attracts around 25,000 searches per year.

We provide registered experts with a variety of free educational resources. These include our quarterly *Your Witness* magazine (now approaching its tenth anniversary), a series of more than 50 factsheets, court reports on cases that have implications for expert witnesses, CPR Viewer software and our expert *e-wire* service. This information flow ensures that experts in the *Register* have the opportunity to be amongst the best-informed experts, with respect to expert witness-specific issues, in the country.

We have also helped experts to deal with some of the problems that have arisen from the unfortunate inability of the expert witness associations to work together productively, the most

## Response to LSC Consultation

### Introduction

---

notable being our work to produce a *Combined Code of Guidance for Experts* from the two competing codes.

5 However, we also recognise that the quality of expert evidence is in large part controlled by the quality of the instructions received. Sadly, we have observed a marked decrease in the quality of instructions to expert witnesses in recent times. To try to help combat this trend, we have published *Practical Guidance for Expert Witnesses in Civil Cases*. Subtitled “What lawyers think experts should know but seldom get round to telling them!”, this guide helps lawyers and experts to work together more productively.

10 Our daily contact with expert witnesses – drawn from across all disciplines, and including some who undertake an occasional instruction and others who work almost exclusively as expert witnesses – has given us a detailed understanding of this ‘litigation support industry’.

The Consultation Paper is subtitled ‘quality, price and procedures’. We consider each of these in turn.



Response to LSC Consultation  
Quality

Quality

The Consultation Paper makes the following assertion:

5                   *“We believe that solicitors should be encouraged to use accredited (quality assured) experts, i.e. experts who are on the register maintained by the Council for the Registration of Forensic Practitioners (CRFP)”*

We will consider this proposition under three heads – need, quality assurance and feasibility – before looking at the structural reasons why scientific evidence can cause problems in the courtroom.

***Is there a need for improved quality?***

10               By seeking to achieve a position where all experts are CRFP accredited, the Consultation implies that the quality of expert evidence, across the board, is in need of improvement. However, not one piece of evidence has been offered to demonstrate this.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that there is no evidence of a <i>general</i> problem with the quality of expert evidence?	79.6%	8.8%	11.6%

*Survey conducted on www.jspubs.com between December '04 and February '05*

The civil arena

15               In the civil arena, following the introduction of the Civil Procedure Rules (CPR) in April 1999, we have seen:

- expert evidence placed under the complete control of the court
- the adoption of a cards-on-the-table approach to litigation
- absolutely clear guidance for expert witnesses on their overriding duty to the court.

20               In the system of case management that existed pre-CPR, lawyers held sway and often used expert evidence as part of their case management strategy. All too often this strategy involved finding the most circuitous route to court, and misuse of expert evidence was just one tactic they adopted. It was, perhaps, understandable, then, that the ‘hired gun’ was seen from time to time.

Response to LSC Consultation  
Quality

This has all been swept away. As Graham Bennett, Solicitor, puts it in his letter to *The Times* (30 Nov, 2004):

“The present law requires the judge to satisfy himself that the witness is expert in the field in which the witness proposes to give evidence. This is done by reference to the witness’s professional qualifications, his experience and, if need be, by questioning him as to his expertise.

“It is only if the judge considers that the witness is properly an expert, and that the witness evidence will assist the jury to make its findings, that such evidence can be allowed. Courts can and do refuse to allow evidence to be given by those who cannot prove themselves to be expert, so there is already proper scrutiny of the witnesses’ credentials.”

One effect of CPR has been to develop a meritocratic system within the civil arena, with the occasional bad expert being readily identified and widely reported, and the good experts no longer used as pawns in the lawyers’ games of brinkmanship.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that the effect of the Civil Procedure Rules has been to solve many of the past problems that solicitor-based case management caused with expert evidence in civil cases?	75.6%	14.9%	9.5%

Survey conducted on [www.jspubs.com](http://www.jspubs.com) between December '04 and February '05

The criminal arena

We recognise that those who have based their assessment of the quality of expert witnesses on media reports over recent months will have been likely to conclude that all expert witnesses are unprincipled Mammon-worshipping rogues! We have lost count of the number of times Trupti Patel has been (mis)reported as having been convicted on Professor Sir Roy Meadow’s evidence – even the Chairman of the Criminal Cases Review Commission was reported to have said as much in *The Guardian* (30 Nov, 2004).

The recent high-profile miscarriages of justice in child death cases do not, we believe, reveal a general problem with the quality of expert evidence – and the Court of Appeal agrees.

## Response to LSC Consultation

### Quality

---

5 In its decision in the Angela Cannings Appeal, it made it plain that the reason for quashing the conviction was not the expert evidence, but the emergence of some new and previously unavailable evidence that had been identified (recent SIDS studies and the possibility of a genetic factor). Whilst the Court of Appeal warned experts of the dangers of being 'over-dogmatic', the main problem it identified was the way in which the courts handle conflicting expert evidence. The decision concludes (*R -v- Cannings* [2004] *EWCA Crim 1*):

*"If the outcome of the trial depends exclusively, or almost exclusively, on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed."*

10 So, turning to the Sally Clark case, we finally have an example of an expert who got it wrong – Dr Williams. His failure to make reference to the laboratory report that ultimately led to Mrs Clark's release was procedural. Rather than explicitly stating that he had looked at the laboratory report and found it irrelevant, he just (mis)filed it in with the other papers in the case. This was a failing. It had dreadful consequences. But can it be really symptomatic of a general problem of  
15 quality amongst expert witnesses? We do not think so.

Professor Sir Roy Meadow has been vilified in the media. In the Clark trial it was reported that:

- his 73,000,000:1 statistic was "wrong" (*see BMJ* 2002;324:41-43 [5 Jan] for Meadow's account of the background on this statistic and its use in the Clark trial)
- the application of "Meadow's Law" ran the risk of switching the burden of proof to the  
20 defendant
- he brought to the court an air of infallibility.

Our conclusion is that none of this ought to have been allowed, *by the trial court*, to result in a criminal conviction where the 'outcome of the trial depended exclusively, or almost exclusively, on a serious disagreement between distinguished and reputable experts'. The Court of Appeal  
25 subsequently thought likewise.

### Leading-edge science

There is a fundamental incompatibility between what science can offer and what the English legal system seeks. And that is 'certainty'. The courts want it; science cannot provide it. For any hypothesis to be scientific it must be capable of being proved wrong – if only the falsifying  
30 evidence could be found. Falsification means science can never provide absolute certainty.

## Response to LSC Consultation

### Quality

---

Much of the vitriol that has been poured on Professor Meadow flows from this incompatibility. He was a world-acclaimed authority, and by all accounts his mere presence in court had a way of winning over juries. What was more, the Court of Appeal noted that he had a certain arrogance. What is arrogance if not a species of self-belief? What do lawyers and the courts crave? Certainty. Is it any wonder that Professor Meadow was called back time after time after time.

Does that make him alone the perpetrator of an injustice? We think not.

### Conclusion

Based on our observations we see no evidence of a present problem with the quality of expert evidence in general.

### ***Quality assurance***

By juxtaposing 'quality assured' and 'accredited experts', the Consultation Paper implies that the accreditation of expert witnesses will achieve quality assurance. We do not accept this premise, for the following reasons:

- Accreditation does not prevent people 'having a bad day', a point accepted by the LSC at paragraph 6.14.
- There is nothing to accredit in an expert's ability to bear witness to their opinions (see below).
- We know of no system of accreditation that would have excluded Professor Meadow or Professor Southall (we name these individuals simply to exemplify our point to a wide audience, and not because we believe they ought to have failed to pass any system of accreditation).
- If accreditation is to function as a gate-keeper, it can only improve quality by excluding those who fall below some agreed standard. We have argued in the previous section that we can find no evidence for there being a general problem with the quality of expert evidence. Accordingly we fail to see the need for a gate-keeper, and will argue in the next section that meaningful accreditation of expert witnesses is not actually possible.

## Response to LSC Consultation

### Quality

---

#### Feasibility – what to accredit

In the current context, an expert is anyone with knowledge or experience of a particular discipline beyond that to be expected of a layman. An expert witness is an expert who is asked to form an opinion (based on the material he is instructed to consider) and bear witness to that opinion.

5        There is, currently, no precondition imposed by English law on the qualities required of an expert witness. It is for the courts, case by case, to make a judgment of the individual's qualities and to weigh the expert's evidence in accordance with this judgment. It is clear to us, therefore, that the only relevant distinction between experts and expert witnesses is that the latter undertake to bear witness to their expert opinions.

10       What is there in a person's ability to form an opinion and bear witness to it that is susceptible to accreditation? The basic skills and knowledge specific to giving evidence are really not that onerous, and are easily acquired through training. In fairness to the CRFP, even it does not suggest that such accreditation is possible. According to the CRFP literature, what it is doing is checking that experts:

15                    *"Take all reasonable steps to maintain and develop [their] professional competence, taking account of material research and developments within the relevant field and practising techniques of quality assurance."*

20       So, the question now becomes: Is the CRFP better placed than existing professional bodies to check an expert's qualifications and understanding of current practice and new developments in the field? To properly consider this question, we need to review the way professional bodies operate.

#### Professional bodies

25       If there is a reason to move to a system of preselection of experts into those who are 'sufficiently expert' to accept expert witness instructions and those who are not – thereby removing the court's freedom to determine on a case-by-case basis which expert witnesses it considers worthy of hearing – why is it thought proper to hand this duty to an *ad-hoc* body, such as the CRFP, rather than encouraging the existing professional qualifying bodies to undertake the task? Indeed, some professions have already taken steps to clearly identify those of their membership suitably qualified to undertake expert witness work, e.g. RICS (Chartered Surveyors) and ICAEW

30       (Chartered Accountants).

## Response to LSC Consultation

### Quality

---

#### The lesson of Michael Wilkey

One of our expert correspondents, who is a speciality assessor for the CRFP and naturally supportive of its system of accreditation, raised the case of Michael Wilkey as an example of why accreditation by professional qualifying bodies was not acceptable. Our correspondent said:

5                   *“As you are aware there have been cases where judges have been critical of the way that experts have acted in court, the celebrated case being that of an architect adversely commented upon by Justice Jacobs. He referred the conduct of the architect to his professional body, who indicated that the architect’s work as an expert was no business of their’s.”*

10                  That is not the position.

Michael Wilkey was an architectural expert witness in the case of *Gareth Pearce -v- Ove Arup Partnership Ltd and Others*, which concerned alleged similarities between the Kunsthall Exhibition Centre in Rotterdam and some designs drawn up by Gareth Pearce. Mr Wilkey was brought to public attention by Judge Jacob when, in delivering his judgment in November 2001, he held that

15                  Wilkey’s evidence of similarities in the designs was manifestly fanciful. Judge Jacob said that ‘so biased and irrational’ was Wilkey’s evidence that he had failed in his duty to the court, under CPR Part 35(3), and bore a heavy responsibility for the case ever coming to trial. Judge Jacob referred the matter, through the defendant’s solicitors, to the Royal Institute of British Architects.

The matter went to a full hearing before the Professional Conduct Committee of the Architects Registration Board (ARB). The decision of the Committee was given on 5 February 2003. In the event, the whole question of the alleged similarities in the two buildings was not considered by the Committee – the parties’ lawyers having agreed that ‘an architect acting reasonably could have found similarities in the drawings’.

20

Instead, the Committee investigated the alleged breaches of duty by Mr Wilkey:

- 25
- his failure to visit the Kunsthall or mention that fact in his report
  - his failure to properly consider the design brief document for the Kunsthall, and
  - his failure to inspect the drawings at the Netherlands Architectural Institute (NAI).

These were all considered within the larger question of the solicitor complainant’s case that Mr Wilkey had failed to provide an unbiased opinion and had failed to consider material facts.

## Response to LSC Consultation

### Quality

---

In every case the Committee found Mr Wilkey not guilty of the charges of unacceptable professional conduct or serious professional incompetence.

5 The Committee disagreed with Judge Jacob about the need for Mr Wilkey to actually visit the Kunsthal as the case involved the alleged graphic copying of plans. The Committee found that the judge had been inadvertently misled into thinking that the design brief for the Kunsthal had been exhibited to Wilkey's original report and that he had failed to read it properly. In fact, the design brief was never exhibited to the report and had not been relied on by Wilkey.

10 So far as the visit to the NAI was concerned, the Committee accepted that Wilkey had never been *instructed* to make such a visit, although he had, at one point, suggested that he should so do. It was pointed out that the claimant was publicly funded and it was unlikely that the Legal Services Commission would have agreed to finance such a trip. The same could be said, incidentally, for a visit to the Kunsthal itself.

15 So, rather than the ARB, the architects professional qualifying body, indicating that the architect's work as an expert was "no business of their's", the Board carefully investigated the judge's criticisms and found them to be unfounded.

If the quality of the expert evidence given by Wilkey was impaired, then the quality of the expert's instructions and the limitations of public funding had a major role to play.

### The attributes of an accrediting body

20 The Consultation Paper sets out attributes of the CRFP that, it argues, make it the ideal accrediting body. These include:

- putting the public interest first
- independence from Government and sectoral interests
- rigorous entry requirements based on an assessment of current competence against criteria developed for each specialty
- 25 • a published code of conduct
- a disciplinary procedure.

The last two points are not unique to the CRFP. Any professional body could implement them, and many do. Indeed, the power a professional qualifying body has to deal with a member found wanting is more effective than any sanction available to the CRFP.

## Response to LSC Consultation

### Quality

---

The problem we see for the CRFP's model of rigorous assessment is that, in recognition of the futility, as we see it, of attempting to accredit the witness-specific elements of the expert witness's performance, it has to base its assessment on peer review of the applicant's expertise.

Where a professional qualifying body already exists, the CRFP approach sets up a parallel system of peer review which would inevitably draw in the same sorts of people who would undertake peer review within the professional body. Having set up a parallel system, the CRFP has no power beyond removal of an individual from its register – whereas the professional body has further disciplinary powers.

The credibility of a claim by the CRFP 'to have independence from government' is rendered nugatory by its dependence on Home Office funding. The Home Office funded its creation, and now, with a reported 1,500 or more individuals on its register, the CRFP is probably still dependent on Home Office funding. This is because the vast majority of those 1,500 are likely to be employed by police authorities – and their budgets come from the Home Office. So the CRFP funding has simply switched from direct to indirect Home Office funding. That is not independence.

The Consultation Paper claims 'that the CRFP is free of sectoral interests' is also flawed. The fact that the CRFP assessment regime for each specialty is developed through consultation with the experts in that specialty, and operated by experts drawn from that specialty, inevitably means that sectoral interests are drawn into the assessment process. This is not a criticism of the efforts of these people, just an inevitable consequence of the fact that you cannot accredit the witness-specific elements of the expert witness.

We turn now to the issue of the CRFP putting the public interest first. We would be more willing to consider this as a unique selling point in the CRFP's favour if there was not a strong sense apparent in the expert witness community that the prime motivation of the CRFP's push into the civil arena is its desire to achieve financial independence from the Home Office. We have already set out the basis for our view that, since the introduction of CPR, the use of expert witnesses in the civil arena has been put in good order. Yet it is only in the civil arena that the CRFP will find a sufficient volume of expert witnesses not employed by the State to give it financial independence. If this motivation is real, then the CRFP is simply putting self-interest before public interest.

The CRFP was originally conceived as a means to ensure that forensic scientists working for the prosecution in criminal cases met a basic standard of competency – because it was these professional experts (rather than expert witnesses) who had been found wanting in the previous two decades. It laid no claim to experts in the civil arena, and, significantly, its procedures were



## Response to LSC Consultation

### Quality

---

designed to meet its stated purpose of providing (mostly) state-employed forensic scientists, scenes of crime officers, and the like, with a professional qualifying body. In its original role, the CRFP has a valuable, and welcome, function to perform – it should not be encouraged to dilute it.

5 The final point to be made is that there are other bodies that match virtually all the attributes. For example, the three expert witness associations — the Academy of Experts (AE), the Expert Witness Institute (EWI) and the Society of Expert Witnesses (SEW). These bodies have many of the attributes identified by the LSC, although traditionally it has only been the AE and EWI who have held any regulatory aspiration. We can see no justification from the arguments presented in the Consultation Paper for the LSC to limit itself to just one accrediting body, especially when it  
10 acknowledges that the intended role would present the CRFP, with its limited public resources, with a huge task.

### The lesson of Barion Baluchi

15 It has been suggested that the case of Barion Baluchi supports calls for CRFP accreditation of expert witnesses. We reject this because of the distinction between an expert witness who falls below some measure of quality and a criminal who impersonates an expert witness.

How can any professional body be expected to prevent criminals from committing crimes? The GMC's revalidation scheme, recently put on hold because of severe criticism by the Shipman Inquiry, is incapable of preventing, or detecting, a future Shipman because revalidation was designed as a way of testing whether a doctor is fit to practice. That has nothing whatever to do  
20 with a doctor's propensity to commit murder.

Likewise, it must be highly unlikely that CRFP accreditation could have stopped Baluchi. Once he had fraudulently adopted the identity of a Spaniard to gain GMC registration, his job was done. The CRFP checks at the GMC would have come back positive. To trap him at that point would require the CRFP to check the authenticity of the GMC records. They may 'check the checkers',  
25 but as Alan Kershaw, CRFP Chief Executive is fond of saying, you have to trust someone.

Baluchi was ultimately caught by a vigilant lawyer. Quality assurance for expert witnesses cannot, as implied by the Consultation Paper, come from CRFP accreditation. It can only come from a system that looks carefully at each expert, in each case, from many angles. Precisely the system we have in place already (the lawyers, the judge, the other experts) and probably the reason why  
30 no one is putting forward evidence for there being a general problem with the quality of expert evidence.

## Response to LSC Consultation

### Quality

#### Conclusion

The Consultation Paper reminds us that the CRFP arose out of concern following a 'number of high-profile miscarriage of justice cases'. However, those cases are not the recent high-profile criminal trials centred on child deaths, but cases reported in the 1970s and '80s.

5 The CRFP, in creating an overarching system of professional skills accreditation, usurps the function of the professional bodies and the courts by preselecting experts who are 'sufficiently expert' to be instructed. Yet it will not prevent miscarriages of justice like those perpetrated in the 1970s and '80s.

10 Leaving aside the fact that no accreditation scheme would exclude a man with the professional stature of Professor Sir Roy Meadow, an accreditation scheme will not prevent a thoroughly competent expert getting it wrong on the day.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that no system of accreditation can prevent a first-class expert witness getting it wrong on the day?	91.6%	3.1%	5.3%

*Survey conducted on www.jspubs.com between December '04 and February '05*

All that is left to consider is the ability of the CRFP to deal with an expert found wanting after the event. The courts have a perfectly good, if slow, system of appeals to deal with such instances, and these usually highlight specific experts who have shown themselves to be wanting.

15 If we had any evidence that there was a general problem with the quality of expert witnesses, it is possible that we would consider the CRFP's attempts to regulate worth pursuing, with significant changes. Since we see no evidence of a quality control problem, we do not see why experts should be made to subject themselves to CRFP accreditation – which will be costly in both time and money.

## Response to LSC Consultation

### Quality

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that the existing system of combined control from professional qualifying bodies and the courts is the best way of ensuring competence amongst expert witnesses?	82.8%	7.9%	9.3%

Survey conducted on [www.jspubs.com](http://www.jspubs.com) between December '04 and February '05

### Science in the courtroom

Based on our analysis of the problems that have arisen within the criminal courts, we suggest that the real culprit in the child death miscarriages of justice is the fundamental incompatibility between science and the courts, as discussed previously.

#### 5 Understanding the problem

Tragic as the consequences have been for the Clark and Cannings families, these types of case represent a tiny fraction of the litigation in the UK. A feature of these prosecutions was that they were based almost entirely on post-mortem medical opinion evidence. What other corroborating evidence can there be when a child dies in its own home under the sole care of its mother?

10 In criminal cases, the court has to be sure beyond all reasonable doubt before returning a guilty verdict – say something in excess of 90% certainty. By contrast, in the civil arena the standard of proof is on the balance of probabilities – so 51% is fine. Clearly, it is only in the criminal arena that the falsification basis of science has the potential to cause problems.

15 Second, it is notable that in both the Clark and Cannings cases, the expert evidence was disputed. The defence teams put forward experts who cast doubt on the opinions of the experts instructed by the Crown. These were criminal trials. The court has to make a finding ‘beyond all reasonable doubt’ before reaching a guilty verdict. Yet all it had to work with was a mass of conflicting scientific evidence.

#### Accept the Courts bear much of the blame

20 The Court of Appeal, ruling in the Cannings Appeal, recognised that it was the trial court’s handling of scientific evidence, not the evidence itself, that was the problem. We quote again the conclusion of that judgment: “If the outcome of the trial depends exclusively, or almost

Response to LSC Consultation  
Quality

exclusively, on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed.”

The central tenet of the Court of Appeal decision is that where a court is presented with evidence that is solely, or mostly, opinion evidence, and where there is a strong divergence of opinion amongst the experts, the court should not feel confident to arrive at a verdict of guilt.

If this sensible advice had been followed in the Sally Clark case, the barrage of conflicting scientific evidence would have prevented her conviction. Likewise, in the Cannings case, the array of defence experts disagreeing with the views expressed by the Crown experts should, in the absence of corroborating evidence, have introduced sufficient doubt to lead the judge to direct the jury to acquit.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that the problems that have arisen in the criminal courts are the result of the way the courts handled conflicting scientific evidence?	80.8%	15.1%	4.2%

Survey conducted on [www.jspubs.com](http://www.jspubs.com) between December '04 and February '05

Take the expert out of the courtroom

Whilst calls for accreditation are easily made, they are also cheap. The real answer lies in changes to court procedure. Legitimate areas of enquiry concerning expert evidence are:

- the suitability and qualification of an individual expert and the reliability of that expert's evidence
- the problem of frontier science or pseudo-science, and what happens when there are new developments
- risk evaluation in relation to expert evidence that is not guaranteed to be free from error.

In the United States Supreme Court, *Daubert -v- Merrell Dow Pharmaceuticals Inc* (1992) 509 US 579 laid down a four-part test to be applied to all expert evidence that was scientific in nature.

These four parts are:

- whether the theory or technique 'can be (and has been) tested'
- whether the 'theory or technique has been subjected to peer review and publication'

## Response to LSC Consultation

### Quality

- in the case of a particular technique, what 'the known or potential rate of error' is or has been
- whether the evidence has gained widespread acceptance within the scientific community.

5 As a result of *Daubert*, expert evidence in the US is more likely to come under closer scrutiny, and at an earlier stage, than in UK proceedings. The parties are aware of the requirements from the outset, and it is common for the court to hear interlocutory applications in relation to the admissibility or relevance of such evidence.

10 Would such rules applied to our own criminal justice system have prevented the jury from hearing Professor Meadow's statistical evidence in the Clark case? Would they have identified the fact that Dr Williams had failed to mention the toxicology report that ultimately led to Sally Clark's release?

15 *Daubert* is not without its own problems. However, US lawyers have made some attempt to address the difficulties surrounding the nature of scientific evidence and its relationship to the judicial process. If our courts were to formulate similar rules, they would, in our assessment, be doing more to tackle the problem of how courts handle expert evidence – rather than forcing experts to subject themselves to expensive, yet ultimately meaningless, accreditation by the CRFP.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you think pre-trial testing of expert evidence would be likely to deal with this problem?	69.8%	16.7%	13.5%

Survey conducted on [www.jspubs.com](http://www.jspubs.com) between December '04 and February '05

## Response to LSC Consultation

### Quality

---

## Response to LSC Consultation

### Price

---

## Price

The Consultation Paper sets out proposals to deal with the increasing cost of expert evidence. The LSC is hampered in its approach to expert fees because it does not currently gather data to enable it to know its annual spend on experts. Neither can it assess the differences there might be between the fees of experts working in the civil and criminal arenas, nor the various specialties.

We will deal with a number of specific aspects of these proposals later, but first will offer some evidence on what has happened to expert witness fees over the past 8 years, based on our own surveys.

Since 1997, we have undertaken a detailed biannual survey of the views, experiences and working practices of experts listed in the *UK Register of Expert Witnesses*. The 2003 printed questionnaire was dispatched to all expert witnesses listed in the *UK Register of Expert Witnesses* along with our June 2003 issue of *Your Witness*. Experts could also complete the survey on-line.

The sample size of all our surveys is above 2,700, with between 500 and 700 experts responding on each occasion. So that you may appreciate of the make-up of this constituency, it is important to know something of the *UK Register of Expert Witnesses*.

The *Register* lists expert witnesses drawn from across the range of specialisms. Some are relatively junior; others are at the top of their profession. It lists some experts who undertake mostly criminal work, a larger group who undertake mostly civil work, and a smaller group who do both. In the current edition of the *UK Register of Expert Witnesses*, which lists almost 3,000 expert witnesses, there are:

- 1,971 experts who undertake some criminal work
- 2,749 experts who undertake SJE instructions
- 2,515 experts who undertake publicly funded cases.

We subdivide the responses to our surveys into broad groups of specialism, and the results over the four surveys conducted are presented in Table 1.

Response to LSC Consultation

Price

Professional category	1997			1999			2001			2003		
	Number of respondents	Report writing (per hour)	In court (per day)	Number of respondents	Report writing (per hour)	In court (per day)	Number of respondents	Report writing (per hour)	In court (per day)	Number of respondents	Report writing (per hour)	In court (per day)
Medicine	166	£124	£870	249	£136	£890	200	£149	£927	230	£153	£1,041
Nursing, etc.	42	£76	£535	36	£68	£512	39	£100	£718	42	£91	£749
Engineering	116	£73	£560	94	£71	£567	63	£85	£663	79	£86	£694
Accountancy and Banking	34	£116	£821	49	£135	£987	24	£133	£895	26	£151	£1,105
Science and Agriculture	68	£89	£543	79	£79	£577	53	£78	£648	37	£82	£690
Surveying and Valuing	35	£77	£629	49	£83	£642	36	£104	£787	24	£121	£984
Architecture and Building	28	£75	£612	19	£77	£612	17	£84	£712	27	£92	£744
Others	58	£76	£525	96	£71	£521	50	£127	£622	78	£109	£802
Overall	547	£88	£637	671	£90	£664	482	£108	£747	543	£111	£851

Table 1: UK Register of Expert Witnesses survey results since 1997.

It is apparent that:

- the average hourly fee has increased by 26% from £88 in 1997 to £111 in 2003
- compounding an inflation rate of 2.5% across that 7 year period would account for an 18% increase, so the real-terms increase has been around 8%
- charging rates have a bimodal distribution, with medical consultants and accountants charging something like 50% more per hour than other experts.

It is no coincidence that expert witness costs in civil cases have increased since April 1999. While one of the main aims of the Access to Justice Act was to decrease the costs of expert evidence, the changes have, in fact, had quite the opposite effect.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that the statistics drawn from our biannual surveys of expert witnesses, showing that fees have increased by ~8% above the rate of inflation since 1997, are a fair reflection of the actual increase in expert witness fees over that period?	58.7%	25.1%	16.2%

Survey conducted on www.jspubs.com between December '04 and February '05

**Inflationary factors affecting expert witness fees**

**How CPR has caused expert witness costs to increase**

Whilst the CPR have been a source of major improvement in the conduct of civil litigation, one consequence has been the move towards every expert report being written as if it will be put before the court. Great care must be taken over the writing of such reports. This inevitably increases costs, and is one reason why the cost of expert reports has risen in recent years.



## Response to LSC Consultation

### Price

However, the vast majority of cases never get to court – instead they settle. In such cases the expert's report is used as a negotiating tool between the parties.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that there are inflationary pressures flowing from the Access to Justice Act 1999?	57.1%	34.2%	8.7%

*Survey conducted on www.jspubs.com between December '04 and February '05*

Is it necessary for reports used in this way to be as detailed as those that will go before the court? If not, then a reduction in costs could be achieved by ensuring experts are instructed to prepare an initial 'outline' report at an agreed cost, proportionate to the (likely) quantum of the case, that would allow the parties to seek a negotiated settlement. Only in the small number of cases that do not settle would the additional expense of a 'fully detailed' report, for use in court, need to be incurred.

We stress the point, however, that it must be for the lawyer (who has conduct of the case and an overview thereof) to instruct the expert to undertake a programme of work that can be completed within a cost regime proportionate to the quantum of the case. The choice of what can or cannot be left out of a report should not, and must not, fall to the expert, who is not competent to make such judgments.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that our suggested changes would be likely to ameliorate these pressures?	45.5%	401.5%	12.9%

*Survey conducted on www.jspubs.com between December '04 and February '05*

## How MROs have caused expert witness costs to increase

The Access to Justice Act widened the scope for conditional fee agreements (CFA). The resultant growth of claims farms and the widespread adoption of CFAs to handle PI cases have resulted in a rapid increase in the number of medical reporting organisations (MRO) in recent years. There is a large, and growing, groundswell of medical doctors who are against their use. Our own analysis is that the MRO market tends to increase costs by selling on reports for two or three times the fee charged by the doctor, and simultaneously reduces report quality by interposing an (often non-legal) intermediary between the instructing solicitor and the medical doctor/consultant.

## Response to LSC Consultation

### Price

---

The increase in the cost of expert evidence created by the MRO is significant but is not included in the statistics we are able to gather. This is because experts can only tell us what they charge the MRO, not what the MRO charges the lawyer.

5 We anticipate that it will not be possible to prevent the use of MROs – that power lies only in the hands of the medical experts. But the LSC has the power to prevent contracted solicitors from using an MRO, thus cutting expert costs. In addition, it must be possible for the activities of MROs to be regulated in two particular respects:

- the mark-up applied should be made clear to the client, lawyer, insurer and expert
- they should be prohibited from interfering with the direct line of communication between  
10 the solicitor and the expert.

Taken together, these changes would, we believe, ameliorate the worst aspects of MRO involvement in cases.

15 Whilst it is a common trick of the tabloid press to seek out extreme examples to prove a point, the LSC's case is not well served by adopting the same tactic. Detailed reports of our surveys are freely available on our website and could have been used in the preparation of the Consultation Paper.

### ***How top quality experts can save money***

20 Whilst experts are not the only people involved in the conduct of litigation, their involvement can be a decisive factor in the path a case takes. If instructed at the earliest stage, an experienced expert can help to focus the attention of the lawyers on the real issues in question and enable cases to run more smoothly, or even settle.

25 The crude focus on fee scales adopted by the LSC will tend to drive the experienced expert away from publicly-funded cases. Such experts are quite able to find proper, market-driven, remuneration elsewhere. That will leave only those experts prepared to work for the lower fees, who are likely to be less experienced. There is a significant danger that the net result will be a lowering, rather than a raising, of the quality of experts prepared to undertake CLS and CDS cases.

## Response to LSC Consultation

### Price

---

#### **Fee bands**

If fee bands linked to those currently set in the criminal arena are introduced in civil cases, then, based on our own survey data, expert witnesses would lose roughly half of their current fee income in such cases.

- 5 There is already considerable concern within expert witness and judicial circles about the low level of expert fees in criminal cases. Consider, for example, the following:

10 *“The second matter that has been the subject of considerable complaint by defence solicitors and experts is the low level of publicly funded experts’ fees. I have had a look at the current scales, and, without going into detail on the figures, they are meagre for professional men in any discipline. I am not surprised that solicitors complain that they have often had difficulty in finding experts of good calibre who are prepared to accept instructions for such poor return. The best expert witness in most cases is likely to be one who practices, as well as giving expert evidence, in his discipline, rather than the ‘professional’ expert witness – one who does little*

15 *else. Justice is best served by attracting persons of a high level of competence and experience to this work. If we expect them to acknowledge an overriding duty to the court and to develop and maintain high standards of accreditation, they should be properly paid for the job. I hope that the Legal Services Commission will take an early opportunity to review and raise appropriately the levels of their publicly funded*

20 *remuneration.”*

A Review of the Criminal Courts of England and Wales  
by The Right Honourable Lord Justice Auld,  
September 2001  
<http://www.criminal-courts-review.org.uk>

- 25 To propose imposing such ‘meagre’ fee scales across the board for expert witnesses in publicly funded civil cases seems calculated to create the same complaints in the civil arena.

As we note in the next section, there is clear potential in the civil courts to tackle some of the causes of increasing expert witness fees without risking the negative supply and competition effects the current proposals are likely to cause.

## Response to LSC Consultation

### Price

---

### ***Proportionality***

The proposal that the seriousness of the crime be taken into account when selecting an expert witness is closely allied to the question of proportionality in relation to quantum in civil cases. In both areas, the same two basic considerations apply:

- 5
- expert witnesses should not be expected to work for inadequate payment
  - expert witnesses are not competent to determine what aspects of a case can be omitted from consideration.

10

It follows, therefore, that if cost savings are required, they have to be realised by the solicitor instructing the expert witness to undertake a programme of work that can be completed within the available budget. But solicitors, who are not experts themselves, often have some difficulty knowing what can safely be omitted in pursuit of proportionality. The answer to this conundrum perhaps lies with greater use of staged instructions by solicitors.

### **Staged instructions**

15

An expert witness could be instructed to prepare an initial report. This would be designed to conduct a 'reconnaissance' of the expert matters raised by the case and to identify potential areas for more detailed analysis. If the quantum in the case, or the seriousness of the crime, warrants investigation of particular avenues of expert enquiry, further report stages could be sanctioned.

20

This approach, already adopted by many experienced litigation lawyers in the civil arena, has the benefit of breaking potentially large expert witness assignments into smaller, more easily managed, stages. And each stage of reporting acts to inform the next stage and to assist in determining applications for prior authority.

### ***Conclusion***

25

We came to the Consultation Paper with some sympathy for the plight of the LSC which, being funded through HM Treasury, simply has to find ways to keep a rein on costs. However, the LSC has:

- made general proposals when it does not actually know what it is spending on expert witnesses – and, for that matter, how will it be able to assess the effectiveness of any changes if it has no detail of current expenditure?

## Response to LSC Consultation

### Price

---

- made no mention of the effect of cost recovery in cases where the losing party is not publicly funded;
- selectively used 'statistics' to try to portray extremes as if they were norms;
- failed to consider any of the structural reasons why the cost of expert evidence has increased in recent years.

5

Thus, we conclude, the LSC has not identified the inflationary drivers on expert witness fees. The LSC has, in our analysis, failed to produce cost-saving proposals that are sufficiently targeted, or neutral in terms of supply and competition, as to be capable of being broadly accepted by expert witnesses instructed in civil cases. If, however, budgetary factors force the LSC to adopt these proposals, we anticipate that quality, competition and supply will all be adversely affected.

10

The LSC needs to work together with the DCA, CJC and others to engage in an honest and open discussion with experts on the factors that contribute to the cost of expert reports. If this is done, we predict that several features of the current litigation landscape could be identified which, if tackled, would not only drive down costs but also enhance access to civil justice and promote its better administration.

15

### Highlighting entries in the UK Register of Expert Witnesses

We have, for many years, indicated those expert witnesses we list in the *Register* who are willing to be instructed in criminal cases and those willing to work in publicly funded cases. We are quite willing to include additional 'flags' so as to identify those experts prepared to agree to such terms as may be set by the LSC from time to time.

20

## Response to LSC Consultation

### Price

---

## Response to LSC Consultation

## Procedures

## Procedures

### *Removal of prior authority*

Prior authority is one of the reasons expert witnesses stay in the publicly funded market, despite low fee rates. The LSC engages in a circular argument when it notes, as a justification for removing prior authority, the fact that it is uncommon for experts' fees to be adjusted on costs assessments [10.7]. Of course they aren't – prior authority prevents such interference on cost assessment.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that removal of the prior authority system would have a serious impact on the number of expert witnesses willing to undertake publicly funded work?	82.4%	14.4%	3.2%

*Survey conducted on www.jspubs.com between December '04 and February '05*

### An alternative: staged instruction

The suggestion we make – of changing to staged instruction of experts as a way of working towards achieving proportionality – would also help the LSC case workers to make informed judgments on applications for prior authorities. Initial expert reports would be modest affairs at a modest cost. If the initial report revealed the need for a further reporting stage, the LSC case worker would have the benefit of the initial report to inform the decision.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that a staged approach to the instruction of experts would offer a way for the LSC case workers to make more informed decisions on applications for prior authorities?	77.3%	20.5%	2.2%

*Survey conducted on www.jspubs.com between December '04 and February '05*

### LSC-specific Terms of Engagement

Based on our surveys, the number of expert witnesses who use written terms of engagement has increased from 32% in 1995 to 47% in 2001. We are regularly asked to help expert witnesses with payment problems that have arisen, in part, from the lack of written terms of engagement.

## Response to LSC Consultation

### Procedures

Indeed, we continually encourage experts to adopt a clear set of terms, and have published suggested written terms in our newsletter and factsheets.

Any encouragement the LSC can offer in this regard is to be welcomed. However, we doubt many expert witnesses will be attracted by the terms proposed. They represent an erosion of the freedom to set terms that make commercial sense to the expert. For this reason, any such terms should be optional.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that any pressure the LSC can bring to ensure expert witnesses adopt clear, written terms of engagement is to be welcomed?	89.3%	6.5%	4.1%

*Survey conducted on www.jspubs.com between December '04 and February '05*

The suggestion that experts should accept any reduction in the amount of their fees that is made on assessment of costs makes no allowance for the possibility that the reason for the reduction is not of their making. Any such provision could only be reasonable if it was restricted to a situation in which the expert's work was found to be below some accepted standard. We also have a concern that any such provision could be seen as giving the expert a financial stake in the outcome of the case, which is uniformly considered unacceptable.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that it is not appropriate for the LSC to stipulate mandatory clauses in those terms of engagement?	84.5%	11.1%	4.4%

*Survey conducted on www.jspubs.com between December '04 and February '05*



Response to LSC Consultation  
Impacts on supply, competition, small businesses

Impacts on supply, competition, small businesses

The LSC has conducted an initial impact assessment on the proposals contained in the Consultation Paper. Two of the findings in the assessment we find wholly untenable.

The small firms' impact test

5 If the proposals to introduce fixed fee bands in the civil arena (with fee levels linked to those currently set for the criminal court) are implemented, the fees paid to expert witnesses in LSC-funded cases will, based on our own survey data, roughly halve. Since, under the proposals put forward by the LSC, there are no changes that will reduce the operating costs of the expert witnesses, having their income drop by ~50% is likely to drive many expert witnesses away from publicly funded work in the civil arena. Since larger organisations are more likely to have a broader base of operation and thus be better able to cope with this change, these proposals, in our analysis, will have a disproportionate effect on smaller, sole practitioner or partnership businesses.

Competition assessment

15 The LSC concludes that on the application of the Cabinet Office's competition filter test, their proposals will have no significant effect on the market.

In a free market, competition is one of the main factors that influence prices. The Consultation Paper notes this fact at paragraphs 9.3, 9.5 and 9.34. Competition is intimately associated with supply in the market. If halving the fees for expert witnesses working on publicly funded civil cases does result in a significant contraction of the market, competition will inevitably be reduced.

Survey response (n = 190)			
	Agree	Neutral	Disagree
We predict a serious impact on supply and competition within the expert witness marketplace if the 'meagre' fee scales on offer in the criminal arena are imposed on expert witnesses in the civil arena. Do you agree?	92.1%	3.2%	4.7%

Survey conducted on [www.jspubs.com](http://www.jspubs.com) between December '04 and February '05

Response to LSC Consultation  
Impacts on supply, competition, small businesses

---

Response to LSC Consultation

Answers to the Specific Questions

---

## Answers to the Specific Questions

### **Question 4.2: Do you view services under the CLS and CDS (legal aid) as public services like the NHS? (See para 5.2)**

5 No, save that they all use external suppliers. Everyone uses the NHS; only an unfortunate minority use the CLS or CDS.

### **Question 4.3: Do you consider that accreditation will generally raise the quality of forensic services provided by experts? (See para 5.13)**

10 No. We do not see, and the Consultation Paper does not offer, any evidence for there being a general problem with the quality of expert evidence provision. Furthermore, we do not consider meaningful accreditation of expert *witnesses* to be possible. In as much as experts can be accredited, we see no reason to impose a system that runs parallel to those that are coming onstream in the professional qualifying bodies (e.g. RICS). No system of accreditation can prevent a first-class expert witness getting it wrong on the day.

15 To convey our scepticism to a wide audience, we note here that we can conceive of no system of accreditation that would have excluded Professors Meadow and Southall (we name these individuals simply to exemplify our point to a wide audience and not because we believe they ought to have failed any system of accreditation).

### **Question 4.4: Do you agree that the bodies identified by the Commission for the quality assurance function are the most appropriate? Are there any other bodies that should be considered as quality assurance bodies? (See para 6.9)**

20 We are not competent to deal with the question of interpreters, but the body identified by the LSC in respect of expert witnesses, the CRFP, is not capable of providing quality assurance – indeed, no system of accreditation can provide quality assurance.

25 If accreditation of the professional competence of expert witnesses as ‘experts’ is thought necessary for some other reason, then the existing professional qualifying bodies are the best placed to provide such validation. Where experts are drawn from a group that does not have a professional qualifying bodies, such as SOCOs, we do see a valuable role for the CRFP: a role from which it ought not be distracted by the LSC.

30 Whilst we do not accept that meaningful accreditation of the competence of expert witnesses as ‘witness’ is possible, other bodies (often with a regulatory aspiration towards expert witnesses) do

Response to LSC Consultation  
Answers to the Specific Questions

---

promote such an exercise and we are not persuaded by the arguments put forward by the LSC for selecting the CRFP over all others who may wish to offer some form of accreditation.

**Question 4.5: What is your professional body and do you consider that it would be practicable for it to work with the CRFP to develop a post-qualification forensic work specialism as we propose? (See para 6.12)**

See our reply to question 4.4.

**Question 4.6: Do you agree with the Commission's view that, even in the long term, compulsory accreditation is not practicable? (See para 6.14)**

Yes, but the LSC's ambition to see most experts undertake CRFP accreditation is likely to create *de facto* compulsion, which would accord with the CRFP's stated ambition. Furthermore, accreditation of the type operated by the CRFP, i.e. a gate-keeper function with entry determined by periodic testing of *current competency*, can only act to raise quality if it is mandatory – which appears to be generally accepted to be unworkable. We have already noted that the CRFP scheme is incapable of providing *quality assurance*.

**Question 4.7: To what extent do you support the Commission's quality assurance proposals and are they equally applicable to all types of proceedings? (See Part 2)**

We do not see any evidence, and the LSC does not provide any, that suggests there is a general problem with the quality of expert evidence.

There is, however, a clear problem with how the courts deal, in the words of the Court of Appeal, with 'serious disagreement between distinguished and reputable experts' providing science-based opinions. This is particularly so in the criminal courts which have to work to the higher standard of proof. We have suggested that the solution to these quite specific problems lies in court procedure, and have suggested the adoption of *Daubert*-style pre-trial hearings.

The current push to compel all expert witnesses to be subject to CRFP accreditation is not only unnecessary, being a periodic test on *current competency* as an expert (not an expert *witness*), it will be ineffective at tackling the causes of the recent high-profile miscarriages of justice, or otherwise improving the quality of expert evidence. In the civil arena its introduction would interfere with the current system put in place by the CPR. Where the CRFP can be effective is in its original role of providing an accrediting body for professional witnesses in the forensic sciences.

Response to LSC Consultation

Answers to the Specific Questions

5 Quality assurance can only come from a system that looks carefully at each expert, in each case and from many angles. And that's precisely the system we have in place already in the form of the lawyers, the judge and the other experts in a case. Perhaps this is the reason why no one is putting forward evidence for there being a general problem with the quality of expert evidence, and why 85% of our expert contributors agree that the current quality assurance system is the best way of ensuring competence amongst expert witnesses.

**Question 4.8: Do you agree that experts' fees for services under the CLS and CDS should be lower than in privately funded cases?**

10 Expert witnesses are external suppliers to the CLS and CDS. Just as the NHS has to pay its external suppliers the market rate for the supply, so should the LSC pay experts. We think services supplied to the LSC, like in the NHS, should be paid for at the market rate – or at a discounted rate based on negotiation. If the LSC has to find cost savings, it should first seek to understand the true level of the factors that are causing inflation in expert witness fees. We have identified some structural issues in the civil arena that are causing experts' fees to rise. If the LSC works to address these it would find experts far more willing to engage with it in jointly seeking practical solutions.

**Question 4.9: Do you agree that an expert should charge less in less serious crime cases? (See para 9.12)**

See next question.

**Question 4.10: Do you agree that “proportionality” should affect experts' fees in civil cases?(See para 9.15)**

20 The only way expert witness fees can be made proportional to the quantum in a civil case, and the seriousness of the crime in a criminal case, is for instructing solicitors to provide experts with instructions that are capable of being completed within the necessary budget. Expert witnesses are not competent to determine what aspects of a case can be omitted from consideration, yet many solicitors would struggle to make this judgment too.

25 We believe changing to the staged instruction of expert witnesses would allow experts to help solicitors move towards achieving proportionality of expert witness costs.

**Question 4.11: What are your views on “proportionality” of costs in family cases? (See para 9.21)**

30 See previous question.

Response to LSC Consultation  
Answers to the Specific Questions

---

**Question 4.12: Do you agree that, like lawyers, experts should keep a detailed record of the work they perform (and of the time taken), and what do you think are the benefits and drawbacks of doing this? (See para 9.33)**

5 We have long recommended that experts maintain a proper record of their work so that they are in a position to provide contemporaneous evidence in support of their invoices.

**Question 4.13: Do you appreciate the Commission's difficulties in dealing with applications for prior authorities in cases that are not managed under individual case contracts? If so, do you agree that abolishing prior authorities and publishing guideline fees is a reasonable way of dealing with this issue? (See para 10.4)**

10 Yes, we do appreciate the difficulty. We do not believe that bringing rates in the civil cases down to the, quoting Auld LJ, 'meagre levels currently applicable in the criminal courts' is a reasonable way of dealing with the issue.

15 By changing to the staged approach to instructing experts, both proportionality and helping the LSC case workers to make informed judgments on applications for prior authorities would be achieved.

**Question 4.14: Do you agree that, for (a) civil and (b) family proceedings, the guideline rates for experts should have (i) a lower minimum and (ii) a higher maximum? And if not, why not? (See Para 9.17 and Annexes F and G)**

Not applicable.

20 **Question 4.15: Which view of an expert's obligation to the court do you feel most accurately reflects the current position? If neither, please state your view of the obligation (See Annex H – Draft terms of appointment).**

25 We see no basis for differentiating between the criminal and civil arenas in respect of the overriding duty. If the expert witness does not have an overriding duty to the criminal court, to whom does he owe a greater duty?

We note, in passing, that advisory experts under CPR owe a duty only to their clients.

**Question 4.16: Do you agree that, in criminal proceedings, the prosecution and defence should work to the same guidelines for experts' fees? (See para 9.9)**

Yes. However, if the criminal courts are working properly, i.e.

Response to LSC Consultation  
Answers to the Specific Questions

---

- the burden of proof is placed in the prosecution,
- the defence team is not expected to prove anything, only try to identify sufficient doubt, and
- judges and juries understand their duties

5 then there is an argument to be made that the prosecution, which has by far the greater evidential burden, might reasonably use additional, and more senior, expert witnesses.

**Question 4.17: Do you agree that, given the width of crime guideline rate bands in the regulations, it is appropriate to introduce guidance on fees within the bands and to divide the bands? (See para 9.11)**

10 Any guidance that helps to reduce uncertainty, and attendant disputes, over fees is to be welcomed.

**Question 4.18: Do you consider that additional specialisms need to be included in the crime guideline bands? If so, what are they, and what group do you consider they should be in? (See Annex E- Part 2)**

15 We have no input.

**Question 4.19: Do you agree that the number and cost of experts' reports in public law Children Act cases have increased significantly in recent years? Do you consider that the assessment work undertaken (or not) by local authorities and the approach of a local authority towards payment of experts' fees has a significant impact? If so, please explain by reference to examples. (See para 9.20 and Annex G-Part 2)**

20

We have no input.

**Question 4.20: Do you consider that, in public law Children Act cases, the court should pay for the expert services it approves/requires (in the same way that the court pays for professional and expert witnesses attending court to give evidence in criminal cases)? (See para 9.24)**

25

We made this suggestion in our submission to the Woolf Report. We think it has much to commend it.

Response to LSC Consultation

Answers to the Specific Questions

---

**Question 4.21: Should solicitors and experts be able to agree to disapply any of the proposed standard terms of instruction in cases under the CLS and CDS? (See Annex H)**

Yes, otherwise the terms are likely to act as a disincentive to expert witnesses who currently have the freedom to use terms that make commercial sense to their own circumstances.

5      **Question 4.22: Do you consider that more detailed guidance than that proposed about fees is necessary, and, if so, do you have any to suggest? (See Annex E - Part2, Annex F and Annex G - Part 1)**

No.

10      **Question 4.23: What are your views on the categories of expert proposed in the fees guidance? Have you others to suggest and, if so, in which group should they appear?**

We have no input.

**Question 4.24: To help experts with questions about Commission-funded legal services do you consider that the Commission's website [www.legalservices.gov.uk](http://www.legalservices.gov.uk) could usefully include a section for experts?**

15      Yes.



Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

---

## **Annex 1: Experts' answers to the specific question**

### ***Answers***

This annex gives the responses made by 16 experts to the specific questions set in the Consultation Paper through the *Register's* website. The ID number links to the list of contributors given at the end of the annex.

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.2 Do you view services under the CLS and CDS (legal aid) as public services like the NHS? (See para 5.2)**

ID	Comment
1	
2	
3	
4	
5	
6	Not really. NHS contracts for continuous employment or engagement. For hospital doctors there are paid vacation times and for all pensions arrangements. The health professions play some part in the administration of care.
7	
8	
9	
10	
11	
12	No.
13	
14	
15	
16	Legal services are not exactly like the NHS; I am more than happy to see means testing before legal services are granted, but the availability of legal services to every member of the community is an essential component of the fair and just state

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.3 Do you consider that accreditation will generally raise the quality of forensic services provided by experts? (See para 5.13)**

ID	Comment
1	
2	
3	
4	
5	
6	In general yes. It must be set out what is the difference of an expert (or a professional witness of fact in a medical forensic context) and his fellows not engaged in such work. I believe there are differences, which have to be recognised.
7	
8	
9	
10	<p>There are 2 kinds of accreditation needed, one to be sure the expert understands the nature of their role and responsibilities and can fulfil those properly. The other is to ensure that the expert actually is an 'expert' in their field. It seems unlikely to me that any general body could sensibly accredit in the latter sense, given the enormous range of expertise required.</p> <p>Given the onerous nature of the job, the danger of being ridiculed or pilloried in court and in public many genuinely expert practitioners in all fields already refuse to take on work as a witness, quite sensibly fearing the possible consequences. Hence those of us who do take on the role have to some extent selected ourselves - if the BMA/GMC etc are incapable of spotting expert doctors who have unhealthy biased opinions it seems unlikely that other less established professions will have more success.</p> <p>Accreditation is not necessarily a bad thing but I think if it is introduced it will lead to fewer experts being available and a tendency on the part of the courts and lawyers to have a false sense of security in believing whatever the expert tells them.</p> <p>I think there is an unhealthy emphasis in much of the material being thrown around on blaming experts which allows the legal profession (whether its private or public) to duck any responsibility for checking out an expert and genuinely allowing the expert to have an independent and</p>

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

	objective role.
11	
12	<p>Absolutely not. An expert should be a member of a professional body, and subject to its disciplinary procedures. A basic requirement should be that the person should assess for themselves whether they are COMPETENT to accept the particular appointment. Incompetent performance should then be punished by the person's professional body - the General Medical Council or equivalent. It would take into account the particular facts of the case.</p> <p>I see no point in giving experts some kind of "licence" in advance of receiving particular instructions, and I certainly do not see that CRFP, even with the help of appropriate bodies, can make such judgements when attempting to accredit witnesses.</p>
13	
14	
15	
16	<p>The problems are: who accredits, to what syllabus and standard, how do you cope with obsolescence, will non-specialists understand that an accreditation may be quite limited in scope? In my own area - digital evidence, the CRFP scheme is floundering because: the area is very new with few external bodies able to give qualifications; "computer expertise" covers a very wide range of activities including the ability to analyse hard-disks, surveill networks, and understanding complex sui generis commercial systems for specialist industries such as financial services, airlines, the broader travel trade, etc. My own solution is to make quality and scope of expertise is a specific component of the pre-trial review - with opposing teams able to challenge extent of expertise at that point in front of a judge. Each potential expert would have to make a "statement of competence" before the hearing. LSC funding would initially only be available to take the expert to PTR; but once the judge had agreed scope and competence, LSC officials would have only limited powers to refuse funding. Experts would still have to produce estimates for prior authority - which could then be checked against work done - as is done at the moment</p>

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.4 Do you agree that the bodies identified by the Commission for the quality assurance function are the most appropriate? Are there any other bodies that should be considered as quality assurance bodies? (See para 6.9)**

ID	Comment
1	
2	
3	
4	
5	
6	I can only give an opinion regarding medicine. At present the CRFP is acceptable bearing in mind that there is no academic body concerned with clinical forensic medicine. The latter is not even recognised as a speciality in its own right. The GMC dose not register specialists.
7	
8	
9	
10	see above (Q4.3)
11	
12	<p>The CRFP is certainly not the right body to deal with accreditation, even if accreditation were desirable - and I am firmly of the view that it is not.</p> <p>A senior spokesman from CRFP spoke at the annual conference of the Academy of Experts in June 2004, and his performance was pathetic. And not a single person in the audience of 120 said they were registered with CRFP, nor did anyone have any intention of doing so.</p> <p>Whilst I did not attend the annual conference of the Expert Witness Institute, I am told that, out of an audience of about 300, only 2 said they were registered with CRFP.</p> <p>So, if so many practising experts see no need to register with CRFP, what can be the point of the authorities forcing us to do so?</p>
13	

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

14	
15	
16	See response to Q 4.3

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.5 What is your professional body and do you consider that it would be practicable for it to work with the CRFP to develop a post-qualification forensic work specialism as we propose? (See para 6.12)**

ID	Comment
1	
2	
3	
4	
5	
6	See above. I personally would wish to see the development either of a college of clinical forensic medicine or an academic body of legal specialisms to incorporate all in the legal field.
7	
8	
9	
10	The only sensible body for IT would be the BCS. However, IT is a very young profession, rapidly changing and it is very common for expert practitioners in IT to have no formal qualifications in the subject. This makes creating any kind of standardised accreditation system very hard to define.
11	
12	Institute of Chartered Accountants in England & Wales; Fellow of Academy of Experts. I have been campaigning at ICAEW for it to award a kitemark for chartered accountants who are thought competent to act as expert witnesses, with knowledge of CPR and a working knowledge of the English legal system. That is the way forward, along with membership of one of the specialist expert witness bodies. And if we get it wrong, those bodies should discipline us. I cannot see that involvement of CRFP in that process would add any benefits for members or for

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

	the quality of justice.
13	
14	
15	
16	My professional body is the British Computer Society but I am also an external examiner at RCMS Shrevenham (Cranfield University) which provides a MSc in "Forensic Computing". CRFP wants to use this course as part of its accreditation, but you can get a Shrevenham MSc without once having had to deal with large corporate computers and networks. This is why I fear that particular accreditations will be misunderstood. CRFP has difficulties where there are no obvious external qualifications in the subject-area, let alone one which have some "forensic practice" component. CRFP itself will find it difficult to be a syllabus-setting body.



Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.6 Do you agree with the Commission's view that, even in the long term, compulsory accreditation is not practicable? (See para 6.14)**

ID	Comment
1	
2	
3	
4	
5	
6	Probably certainly in the civil field where the required professional expertise may be invested in a few with otherwise no or little interest in the legal field as such.
7	
8	
9	
10	
11	
12	I do agree it is not practicable - or necessary.
13	
14	
15	
16	Compulsory accreditation is a mistake - there will always be specialists who can advise the courts on particular subjects who have no wish to become "professional" experts.

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.7 To what extent do you support the Commission's quality assurance proposals and are they equally applicable to all types of proceedings? (See Part 2)**

ID	Comment
1	
2	
3	
4	
5	
6	I have seen and been involved in criminal cases where there have been major differences in the quality of evidence both professional and expert such that I do feel that quality control should be advised.
7	
8	
9	
10	
11	
12	I see no point whatever in having the LSC or the CRFP attempt to control the quality of expert witness evidence. That is for the courts, and I see no difference in the type of court. Judges already must approve the use of a particular witness as part of the CMC procedure, and judges must decide which expert's opinion to accept. I do believe judges should be more ready to report witnesses to their professional bodies if they get things badly wrong, but none of this has any relevance to the current proposals. The LSC pays for justice, and judges impart it. There is no need for any further complications.
13	
14	
15	

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

16	

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.8 Do you agree that experts' fees for services under the CLS and CDS should be lower than in privately funded cases?**

ID	Comment
1	
2	
3	
4	
5	
6	Using the NHS as an indicator there may be a case for slightly lower fees in LSC funded case, guarantee of quick payment or indeed payment without too much hassle. But as stated earlier there are differences particularly no pension.
7	
8	
9	
10	I think that an expert should be paid a fee that reflects the level of responsibility being taken. In criminal cases less money is usually involved but the expert may be responsible for changing someone's life forever which to me is a huge responsibility and not one that I would readily undertake. To suggest that this should somehow be done more cheaply than the same level of work in a case that just involves money seems wrong. It is inevitable that if fee rates are not commensurate with the salaries and fees paid in the particular profession then there will be a shortage of experts, which will lead to poorer quality and injustice.
11	
12	Whatever for? I am a professional, and worthy of my hire. I pay my share of taxes (and how!) and it is taxpayers' money which pays for legal aid. If I wish to give money to charity (and I do) then that is my choice. But justice is not a charity, and it should be the right of all, rich and poor, to rely on the courts to impose justice. Why should I subsidise that process of my work, and charge a higher rate for services to those who can afford and who, like me, have already paid their share of taxes?
13	
14	

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

15	
16	

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.9 Do you agree that an expert should charge less in a less serious crime cases?**

ID	Comment
1	
2	
3	
4	
5	
6	No. Work is work. I appreciate that complicated criminal cases will require or may require greater in depth knowledge and are likely to take longer but the expertise lies amongst other factors in the marshalling of the arguments.
7	
8	
9	
10	
11	
12	Not really. The expert may have less work to do in less serious cases, but the hourly rate should be the same. After all, this expert has been chosen for this expert's particular skills, so why should he/she be worth less on some cases than on others?
13	
14	
15	
16	

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.10 Do you agree that “proportionality” should affect experts’ fees in civil cases?(See para 9.15)**

ID	Comment
1	
2	
3	
4	
5	
6	What evidence is there that a lower damage case would require less work from an expert? No, a fee is a fee.
7	
8	
9	
10	see above (Q4.9)
11	
12	I am attracted to the idea of the expert report not being a Rolls-Royce job in every case, but it is for the court to decide when a shortened version is acceptable. And there are issues of professional negligence to address, if a shortened report did not address issues which a party thought important to their case, but the expert was not permitted to address. Instructing solicitors cannot decide on what should be missed out of a shortened report; they will insist on the expert doing his best for each client every time. Only judges can decide.
13	
14	
15	
16	

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.11 What are your views on “proportionality” of costs in family cases? (See para 9.21)**

ID	Comment
1	
2	
3	
4	
5	
6	I do not know enough this to comment.
7	
8	
9	
10	
11	
12	I have no strong views, except to say that, as an expert accountant, I am involved in family cases only when there are substantial assets to be valued - typically the family business. So in a way, proportionality is automatic, because I would never be involved in smaller cases.
13	
14	
15	
16	See answer 4.10



Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.12 Do you agree that, like lawyers, experts should keep a detailed record of the work they perform, (and of the time taken), and what do you think are the benefits and drawbacks of doing this? (See para 9.33)**

ID	Comment
1	
2	
3	
4	
5	
6	In general yes even as to act as an aide memoire.
7	
8	
9	
10	I already do this, although probably not at the same level of granularity as a lawyer. I keep all notes, emails and other material relating to a case until I am sure that the matter is 100% settled. I would consider it unprofessional to do anything else.
11	
12	Absolutely. For 20 years I have maintained fully detailed time records, and attached a detailed time summary to every bill I issue. And I have lost very little in taxation or detailed assessment of costs - those instructing me, and the costs judge, can see exactly what I have charged for.
13	
14	
15	
16	Yes

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.13 Do you appreciate the Commission's difficulties in dealing with applications for prior authorities in cases that are not managed under individual case contracts? If so, do you agree that abolishing prior authorities and publishing guideline fees is a reasonable way of dealing with this issue? (See para 10.4)**

ID	Comment
1	
2	
3	
4	
5	
6	Prior authority is helpful to the expert unless s/he knew of the bracket within which s/he would work with 'approved' solicitors
7	
8	
9	
10	
11	
12	<p>I do appreciate the difficulties, but I almost always provide a costed programme of work for my assignments, whether privately or publicly funded. That way, those instructing me can see what work I have to do, even before they choose to instruct me.</p> <p>Prior authority is essential to the process, but the Full Case approach in the Very High Costs Case programme is very difficult. I see a step by step approach as far better for all concerned, with approval only of each specified step. That would provide certainty of payment for the expert, but the opportunity for the LSC to call a halt, or call for an enquiry, if costs are getting out of hand. And the shortened report mentioned above would help in this process.</p>
13	
14	
15	
16	Please see my remarks above about encouraging the greater use of PTRs before a judge - and preferably the one who will try the case.

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.14 Do you agree that, for (a) civil and (b) family proceedings, the guideline rates for experts should have (i) a lower minimum and (ii) a higher maximum? And if not why not?(See Para 9.17 and Annexes F and G)**

ID	Comment
1	
2	
3	
4	
5	
6	I am not clear why a lower rate has to be incorporated. Just state the upper rate and if the expert wishes to charge even less let him be a free agent.
7	
8	
9	
10	The civil proceedings I have been involved in have been highly contested, unpredictable such that it would have been impossible to predict the amount of fees at any point. Until a few months ago I thought all expert work on a recent case was finished but now find myself being asked to work on a possible re-trial! Unfortunately smaller cases do not involve less work. I do reduce my fee rate for smaller cases but there is a point beyond which it is simply not economic for me to do the work, particularly easier much less contentious work in my industry is available at higher rates!
11	
12	Proportionality is relevant to the amount of work to be done by the expert. The hourly rates should not change. The LSC has sufficient control already, by asking instructing solicitors to obtain three fee quotes, and by asking the solicitor to justify the use of one expert over another, if the intended expert is not the cheapest.
13	
14	
15	
16	Please see my remarks about the "market-place" and experts

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.15 Which view of an expert's obligation to the court do you feel most accurately reflects the current position? If neither, please state your view of the obligation (See Annex H – Draft terms of appointment).**

ID	Comment
1	
2	
3	
4	
5	
6	I feel that it makes life easier if the duty was to the court. To all intents and purposes this position is understood by both sides in criminal cases.
7	
8	
9	
10	<p>I had not realised until recently that the position for criminal experts was any different to that for civil experts. It seems ridiculous to me that there should be a difference. It implies a different standard of justice between the two branches of the law. I have the impression that overall the standard of experts in terms of their objectivity has improved since CPR was introduced, if only because it provides the expert with a clear statement to use to resist the pressure often placed on him/her by lawyers.</p> <p>I don't find a conflict between my duty to the court and my duty to my client. If the client has a poor case technically then the sooner I tell them that the better they are able to deal with the matter.</p>
11	
12	Experts have an overriding duty to the court. Period! There can be no deviation whatever from that rule, whatever the type of court or nature of case.
13	
14	
15	

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

16	When giving evidence in criminal matters the over-riding duty is to the court; prior to that there is a duty to the instructing solicitor to ensure that he understands all the technical issues. Experts should never place themselves in a position where they have agreed to give evidence but where instructing lawyers have sought to limit the scope of evidence to the point where the expert feels uncomfortable

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.16 Do you agree that, in criminal proceedings, the prosecution and defence should work to the same guidelines for experts' fees?(See para 9.9)**

ID	Comment
1	
2	
3	
4	
5	
6	Of course. An expert must be prepared to give evidence and views to either side and I believe there have been occasions when an expert called by one side has given evidence for the other where the original side found the expert's evidence not helpful.
7	
8	
9	
10	
11	
12	Yes. The state has a duty to prosecute, and the accused has the right to proper representation. In experts as in all other issues in criminal (and indeed in civil) cases, there must be equality of arms.
13	
14	
15	
16	In very broad terms, yes. But the roles are rather different and that may need to be reflected in specific instances.

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.17 Do you agree that, given the width of crime guideline rate bands in the regulations, it is appropriate to introduce guidance on fees within the bands and to divide the bands?**  
(See para 9.11)

ID	Comment
1	
2	
3	
4	
5	
6	The bands are too wide. Notwithstanding that there is no speciality of clinical forensic medicine, I call myself a consultant for the purpose of fee claims. So far it has always worked.
7	
8	
9	
10	
11	
12	Some guidance is helpful, but the rates in the bands shown are derisory. They will do nothing to attract competent witnesses to act in publicly funded cases; there will be a two-tier profession as there is already with barristers. The whole issue can be dealt with under the "best of three" fee estimates I describe above.
13	
14	
15	
16	In general terms, yes. But see my earlier remarks about the "marketplace" in which experts operate.

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.18 Do you consider that additional specialisms need to be included in the crime guideline bands? If so, what are they, and what group do you consider they should be in? (See Annex E- Part 2)**

ID	Comment
1	
2	
3	
4	
5	
6	I do not have enough information to answer this
7	
8	
9	
10	
11	
12	I am an accountant. Accountants have a band in the consultation paper (but at a rate at which I would not be prepared to work). So the question is irrelevant to my profession.
13	
14	
15	
16	<p>The arguments for computer experts are:</p> <ul style="list-style-type: none"> <li>* digital evidence is now so important because so many individuals have PCS, email accounts etc and it can occur in a very large number of "ordinary" crimes</li> <li>* unlike in most forms of forensic science, the entire landscape changes every few years as new operating system, application programs, social structures etc develop. Computer experts face unparalleled problems of "keeping up to date"</li> <li>* the development of specialist law enforcement resources such as NHTCU mean that, for fair trials to take place, there has to be a body of competent expertise available to the defence</li> </ul>



Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.19 Do you agree that the number and cost of experts' reports in public law Children Act cases have increased significantly in recent years? Do you consider that the assessment work undertaken (or not) by local authorities and the approach of a local authority towards payment of experts' fees has a significant impact? If so, please explain by reference to examples.(See para 9.20 and Annex G-Part 2)**

ID	Comment
1	
2	
3	
4	
5	
6	I do not know
7	
8	
9	
10	
11	
12	I know nothing of this topic.
13	
14	
15	
16	No comment

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.20 Do you consider that, in public law Children Act cases, the court should pay for the expert services it approves/requires (in the same way that the court pays for professional and expert witnesses attending court to give evidence in criminal cases)? (See para 9.24)**

ID	Comment
1	
2	
3	
4	
5	
6	Why any difference unless there is an impossibility to obtain the services of relevant experts.
7	
8	
9	
10	
11	
12	I have no comment.
13	
14	
15	
16	No comment

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.21 Should solicitors and experts be able to agree to disapply any of the proposed standard terms of instruction in cases under the CLS and CDS?(See Annex H)**

ID	Comment
1	
2	
3	
4	
5	
6	I am not sure what would flow from this
7	
8	
9	
10	
11	
12	Yes. My terms are agreed with solicitors, and I see no need for another level of interference in my commercial terms or in my professional terms (the latter of which are in accordance with CPR).
13	
14	
15	
16	In principle, yes. Subject to what those standard clauses would be.

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

---

**4.22 Do you consider that more detailed guidance than that proposed about fees is necessary and, if so, do you have any to suggest?(See Annex E- Part2, Annex F and Annex G- Part 1)**

ID	Comment
1	
2	
3	
4	
5	
6	In general it appears to be comprehensive but see earlier regarding lower banding scales
7	
8	
9	
10	
11	
12	No.
13	
14	
15	
16	

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

**4.23 What are your views on the categories of expert proposed in the fees guidance? Have you others to suggest and, if so, in which group should they appear?**

ID	Comment
1	
2	
3	
4	
5	
6	It does not make sense for medics, who are experts but not NHS consultants.
7	
8	
9	
10	
11	
12	As an accountant I am included, so I have no comment.
13	
14	
15	
16	See response to 4.18.

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

---

**4.24 To help experts with questions about Commission-funded legal services do you consider that the Commission's website [www.legalservices.gov.uk](http://www.legalservices.gov.uk) could usefully include a section for experts?**

ID	Comment
1	
2	
3	
4	
5	
6	Probably
7	
8	
9	
10	
11	
12	I suppose so.
13	
14	
15	
16	Yes

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

### ***The Respondents***

ID	Name	Private	Work profile						
			expert witness workload	Percentage of workload spent on...					
				Criminal cases		Civil cases		Family cases	
				PF	Non-PF	PF	Non-PF	PF	Non-PF
1		Y	25%	0.1%	1.2%	1.2%	22.5%	-	-
2		Y	50%	18.7%	18.8%	-	12.5%	-	-
3		Y	60%	-	-	48.0%	12.0%	-	-
4		Y	10%	-	-	0.5%	9.5%	-	-
5		Y	60%	-	-	-	48.0%	-	12.0%
6	Dr S E Josse	N	75%	47.3%	5.2%	20.3%	2.2%	-	-
7		Y	90%	0.1%	2.6%	84.7%	2.6%	-	-
8		Y	80%	-	4.0%	22.8%	53.2%	-	-
9		Y	10%	-	1.0%	-	9.0%	-	-
10	HUNT, Dr Gillian	N	70%	-	-	-	70.0%	-	-
11		Y	25%	-	-	-	25.0%	-	-
12	MAKIN, Chris	N	100%	5.0%	-	7.0%	63.0%	2.5%	22.5%
13		Y	100%	90.3%	4.7%	0.3%	4.7%	-	-
14		Y	50%	-	-	25%	25.0%	-	-
15		Y	80%	0.2%	3.8%	-	72.0%	-	4.0%
16	SOMMER, Peter Michael	N	75%	60.0%	-	-	14.2%	0.8%	-

*Key: PF = Publicly funded work, Non-PF = Non publicly-funded work*

Response to LSC Consultation  
Annex 1: Experts' answers to the specific question

---



Response to LSC Consultation

Annex 2: Polling results

---

## **Annex 2: Polling results**

### ***Work profile of the contributors***

We asked each contributor to tell us:

- What percentage of his or her workload is expert witness work
- How the expert witness workload is split between criminal, civil and family cases
- How much of each category is publicly funded

These data have allowed us to prepare the following work profile analysis:

- 57% of our expert contributors undertake some publicly-funded criminal cases, but only 10% spend more than 20% of their time on such work.
- 65% of our expert contributors undertake some publicly-funded civil cases, with 13% spending more than 20% of their time on such work.
- 15% of our expert contributors undertake some publicly-funded family cases, with just 4% spending more than 20% of their time on such work.

### ***Results***

The results of the survey are presented in table form within the body of the response.

## Response to LSC Consultation

## Annex 2: Polling results

## Contributors

This is a list of the expert witnesses who chose to express their views through the on-line voting system. Experts with a 'Y' after their name have asked that their contributions be kept confidential.

[illegible]

## Response to LSC Consultation

### Annex 3: Correspondence

## Annex 3: Correspondence

This annex presents all the correspondence received on the consultation from expert witnesses listed in the *UK Register of Expert Witnesses*.

### *Correspondence received by e-mail*

<b>Private</b>	No
<b>From:</b>	"Brett Halliday" <brett@bretthalliday.co.uk>
<b>Date:</b>	Tue, 7 Dec 2004 11:06:37
<b>Message</b>	<p>I do not like the idea of writing outline reports (at lower cost).</p> <p>When I write a report, the 20 pages or so that it takes are not just 20 pages to satisfy Court requirements, they are 20 pages leading up to a final discussion and my opinion on the standard of treatment.</p> <p>Cases are rarely black and white, there is usually a reasoned argument to make on both sides. The only way I can reach a viewpoint is to read all of the hospital records etc. in minute detail and then to write a point by point analysis of the case, pointing out both sides of the argument and then reaching a carefully crafted conclusion.</p> <p>Often I myself do not know which way I am going to decide until late on in my report.</p> <p>I usually take about 7 hours to do this on a typical medical malpractice case.</p> <p>I have been asked to do quick and cheap reports, but I can never be sure that if I just spend two hours glancing through the papers etc. that the conclusion I reach will be one that I can later defend in Court. A case may hinge on a small scribble in the nurses part of the record. These have to be searched for.</p> <p>To do a proper job I take my full 7 hours and I think this is worthwhile investment by the client as they then have a fully detailed and logically reasoned report (supported by references etc) so that they can then make a proper decision about what to do next.</p> <p>At the end of the day an "half price" report will be worth almost nothing.</p> <p>I also think that appraisal and accreditation are pretty meaningless. It is only the solicitor running the case that knows how good (or bad) my reports are and it is they who then recommend me to their colleagues that result in my getting more and more work. Going to lectures and getting "brownie" points will not make me a better expert.</p> <p>Brett Halliday FRCS FRCOphth  Consultant Ophthalmologist  The Coplow, Day Case Cataract Unit  Hampton Lane  Meriden  Coventry  CV7 7JR  UK</p> <p>Tel: +44 (0) 1676 521073  Fax +44 (0) 1676 521074</p>

# Response to LSC Consultation

## Annex 3: Correspondence

<b>Private</b>	No
<b>From:</b>	Martin Ward Platt <m.p.ward-platt@ncl.ac.uk>
<b>Date:</b>	Wed, 8 Dec 2004 09:40:32
<b>Message</b>	<p>I would like to make some points with respect to medical expert witnesses.</p> <p>1 Most specialists work for the NHS at least part of the time. Those who undertake private work can choose to divide their time between consultations, operations or procedures, and expert witness work. These people will apportion their time to some extent according to economic principles: if expert witness work pays substantially less than direct patient care, it becomes unattractive. Hence one inflationary pressure for these people is the increasing income from private medicine.</p> <p>2 Other specialists work exclusively and full time for the NHS (outside London), especially paediatricians, and this has implications for family courts as well as for civil litigation involving obstetrics/neonatal care. These doctors are now subject to the new NHS consultant contract, which specifies that for any work done in NHS time and attracting a professional fee, that fee must be remitted to their employer: ie they do not see it! This forces external work such as expert witness work into non-NHS-work time, ie evenings, weekends, and annual leave. In this situation most professional people feel that they should be charging premium rates rather than bearing a reduction in their income for 'out of hours' work. I would argue that even without the LSC proposals, there is a real risk that the supply of medical experts prepared to do legal work is seriously endangered. Add these new proposals, and many will simply say, 'what is the point?'</p> <p>3 Now to put my money where my mouth is. As a full time practising NHS paediatrician I have done a quantity of legal work over the last five years and more, in civil, criminal and family cases. I have been told that I am highly regarded both for my reports and for my performance in court. I have attended appropriate Bond Solon training courses. I have clear terms of engagement. A number of judges have made specific and public comments about the high quality of my evidence. All of my medico-legal work is done in my own time on top of my full time job, and I take days in court, experts' meetings etc in annual leave. However I am seriously considering giving up all medico-legal work from the end of March 2005 because the burdens of the work are increasingly difficult to justify in relation to the financial return and the effect on my home life.</p> <p>MP Ward Platt</p> <p>--</p> <p>Dr MP Ward Platt Consultant Paediatrician &amp; Senior Lecturer in Child Health</p> <p>Newcastle Neonatal Service Ward 35, Royal Victoria Infirmary Newcastle upon Tyne NE1 4LP, UK</p> <p>Phone +44 191 282 5197 (direct), +44 191 233 6161 (switchboard) Fax +44 191 282 5038 (office hours), +44 1670 789556 (out of hours)</p>

<b>Private</b>	
<b>From:</b>	
<b>Date:</b>	
<b>Message</b>	

## Response to LSC Consultation

### Annex 3: Correspondence

--	--

<b>Private</b>	No
<b>From:</b>	ARDONBAYLEASSO@aol.com
<b>Date:</b>	Mon, 13 Dec 2004 08:50:32
<b>Message</b>	<p>Dear Sir,</p> <p>I am a consultant fingerprint expert. I am totally against joining the CRFP. The fingerprint and the scenes of crime sections are totally inadequate. The committee is run by either serving police experts or ex-experts. They have too much influence and have no idea on how the independent experts operate. They are not up to date with the scientific methodology of forensic ridgeology. They are not up to date with the training.</p> <p>Keep up the good work,</p> <p>Kindest regards,</p>

Response to LSC Consultation

Annex 3: Correspondence

	Allan Bayle.
--	--------------

<b>Private</b>	
<b>From:</b>	
<b>Date:</b>	
<b>Message</b>	

## Response to LSC Consultation

### Annex 3: Correspondence

--	--

<b>Private</b>	No
<b>From:</b>	EddieJosse@aol.com <b>Speciality Assessor with the CRFP</b>
<b>Date:</b>	Thu, 23 Dec 2004 14:00:58
<b>Message</b>	<p>I am sending some further comments on the analysis made by J S Publications on the LSC consultation document.</p> <p>As you are aware there have been cases where judges have been critical of the way that experts have acted in court, the celebrated case being that of an architect adversely commented upon by Justice Jacobs. He referred the conduct of the architect to his professional body, who indicated that the architect's work as an expert was no business of their's.</p> <p>I believe that there is evidence admittedly anecdotal that some experts are performing less well than is to be expected. Barristers know of them.(Page 2)</p> <p>How do we know that Professor Meadow would have passed accreditation by the CRFP? I agree that his evidence should have been challenged in court but he did give it not someone else. I feel that you are being too dismissive of the CRFP. I disagree most profoundly that 'there is nothing to accredit in an expert's ability to bear witness to their opinions'(Page 4)</p> <p>As I have indicated elsewhere the GMC does not check upon a doctor's ability to act as an expert per se. I suppose they might be involved where an expert is grossly stepping beyond what is perceived as reasonable medical practice. In the field of clinical forensic medicine certainly criminal the CRFP appears to be the only body able at present to take on this task.</p>

## Response to LSC Consultation

### Annex 3: Correspondence

	<p>(Page 5)</p> <p>Already addressed is the inability of the GMC and apparently other professional bodies ie architects to monitor their registered members for work in the expert field. There is no academic college in clinical forensic medicine to offer academic qualifications. The Soc. of Apothecaries is an examining body only. Only the Psychiatrists and Pathologists have a forensic component to their membership examinations and I do not know how or whether they review the membership status of those members who fall foul of the legal system. Furthermore it is not helpful to the legal system if an expert is only called to account during the trial itself rather than before.(Page7)</p> <p>I do not believe that it would be possible to stage reports in the criminal arena. These cases nearly always go to court. (Page12)</p> <p>I disagree with the response to their question 4.3 for the reasons given earlier.(Page 14)</p>
--	--

<b>Private</b>	No
<b>From:</b>	"Solomon Green" <sosgreen@onetel.com>
<b>Date:</b>	Wed, 22 Dec 2004 19:04:06
<b>Message</b>	<p>I understand that the Legal Services Commission, on the basis of several widely reported and partially misreported medical cases, is suggesting that the current quality of Expert evidence is inadequate and has suggested that solicitors should be encouraged to use accredited (quality assured) experts, i.e. experts who are on the register maintained by the Council for the Registration of Forensic Practitioners.</p> <p>This is the typical response of a parasitical body to a genuine problem. Create another parasite and nourish it by forcing other bodies to support it.</p> <p>The nonsense can best be addressed by considering the cases in which Sir Roy Meadow has been involved and where his evidence has been, retrospectively, devalued. Is there any doubt that until the Sally Clark case was reversed, Sir Roy Meadow would have been accredited by the CRLP? Would this accreditation have made it easier or more difficult for the Sally Clark case to be reversed?</p> <p>The range of possible disputes is so broad that it would be totally impossible to accredit all the experts who might be required to assist the Courts in order that justice might be done.</p> <p>Take my own field - Investment. I cover a broad range and there are a very few areas where I believe that no one else in the UK has the necessary combination of professional and academic knowledge together with experience to be a credible expert. On the other hand, I turn away at least a third of the cases which come to me (usually while trying to suggest others more expert than I) because I know that, although I might be able to assist the court, my expertise in the area is inadequate. .</p> <p>Some years ago I was approached by the Inland Revenue to act for them in a case where there were, perhaps, about fifty persons in the UK who possessed the necessary expertise in the field and I was not one of them. However, when taken in conjunction with another aspect of the case, out of the fifty, there was only one person in the UK with the necessary expertise to provide evidence. He had never been an expert witness before but I understand that his assistance to the Court was enormous. No similar case had ever arisen and it is unlikely that a similar case will ever arise in the future. Would the Court have found their man if it was a requirement that he should have had prior accreditation by the CRLP?</p> <p>For more than twenty years my experience, as an expert witness, has brought me into contact with regulators in the Financial Services industry. I have found that, at</p>



Response to LSC Consultation

Annex 3: Correspondence

	<p>many levels and in many areas, there are singularly few of those regulators who understand the operation of the industry which they are supposed to be regulating even though the FSA has been active in recruiting from within the financial services industry. If this applies to the FSA whose range, while too broad, is still confined to one industry, how much more so will it be with the CRLP.</p> <p>The existing bodies, the Academy and the Institute of Experts, are run by experts who have an interest in ensuring that their members conform to minimum standards as regards ethics, reporting and the giving of evidence. Many of those members are, as I am, members of professional bodies and are regulated as to their professional expertise by those bodies. What can the CRLP add? And why should the courts be deprived of the best expert advice which might be required to try an action in a case which is so specialised that the real experts in the field may only be required to provide evidence once in a lifetime because none of them are accredited by the CRLP?</p> <p>The LSC consultation document seems more motivated by a desire to reduce the costs of publicly funded cases and the fees which might be paid to genuine experts than to any improvement in the provision of justice. The supposed inadequacy of expert evidence will not be improved by the suggested process of mandatory accreditation by the CRLP. . In so far as the process might lead to the exclusion of some real experts from cases where their expertise is desirable, the proposal runs contrary to the interests of justice.</p> <p>Solomon Jacques Green MA. FIA, MAE</p> <p>22 December 2004</p>
--	--

<b>Private</b>	No
<b>From:</b>	John Keast-Butler <john.keastbutler@btinternet.com>
<b>Date:</b>	Thu, 23 Dec 2004 10:14:27
<b>Message</b>	<p>Dear Dr Pamplin,</p> <p>I am simply writing to say how very helpful I found your analysis of this document and that I fully support the response that you have made. If it would be more valuable to for me to fill in one of the forms than simply writing to you, please let me know, although time I scarce as I will be going away on 9 Jan 05 for 5 weeks and have a lot to get done before then.</p> <p>I am intrigued to know what proportion of the costs of legal cases are made up by the fees of barristers and solicitors, something that hardly ever seems to be seriously questioned - perhaps this is because so many members of parliament are "failed" barristers! It must be huge in comparison with the fees paid out for experts.</p> <p>Yours sincerely,</p> <p>John Keast-Butler</p>

<b>Private</b>	No
<b>From:</b>	colin vogel <vogelvet@dircon.co.uk>
<b>Date:</b>	Thu, 30 Dec 2004 14:29:26
<b>Message</b>	<p>LSC Discussion Document on Expert Witness Provision.</p> <p>The proposals are based on a guestimate of something that has never been measured in any</p>

## Response to LSC Consultation

### Annex 3: Correspondence

	<p>way. That cannot be then taken as evidence that there is a need for change.</p> <p>Direct contracting of expert services would mean that the expert had a client who was neither a party to the case nor their solicitor. That raises questions about legal privilege etc. It would also mean that the expert was under financial pressure to tailor their evidence to what was cheapest and easiest rather than what might be in the party's best interest.</p> <p>Accredited does not mean quality assured. It means that they expert was accepted by a self-elected body at some stage in the past . Court performance means quality assured, and the CRFP does not assess that – the Courts and instructing solicitors do.</p> <p>Miscarriages of justice have occurred recently, but in all the cases I am aware of they involve experts that would have been accredited by any organisation you can think of. There is no evidence that there is a problem of miscarriages involving experts at the 'lower end' of the spectrum. The problems that have occurred have been with prosecution witnesses. I t would be appropriate to insist on accreditation of them, but no reason for increasing defence costs by insisting on it for defence experts where there is no evidence of a problem.</p> <p>Accreditation by CRFP will not lead to lowered costs. To be accredited an expert needs to have given evidence in a significant number of cases, and once they have done so they are not going to accept the lower fee. Experts will also have to recoup the accreditation costs, which will be considerable. There might be a case for saying that solicitors can pay an extra fee of say £20 every time they use a CRFP expert, to cover the new cost.</p> <p>Section 10.8 should refer to Court rather than judge because magistrates also make such orders.</p> <p>It is illogical to require 3 competitive quotes to justify the C band payments in specialities where there is a great shortage of experts anyway. There may not be 3 experts prepared to quote for a particular case. Those that do will inevitably have to increase their fees to cover the 66% of enquiries which will now not lead to any instructions. In most cases it is not possible to quote accurately without seeing the papers. A requirement for three experts to be sent the papers before one of them can even be instructed will inevitably lead to delays in justice. The incentive for the good experts will be to only accept instructions in the larger cases where such hidden costs can be better justified.</p> <p>I work in a field where many criminal prosecutions are private prosecutions. The prosecuting body can easily afford to pay the extra costs of accreditation for their panel of 'experts, and they will not be bound by a requirement for 3 competitive quotes. They are not even bound by the fee scales because they agree in advance to pay the difference between the expert's fee and what they receive from the Court. There cannot be any equality of arms if defending solicitors are restricted to inexperienced, and so cheap, experts.</p> <p>Questions</p> <p>4.3 No</p> <p>4.4 No. Yes</p> <p>4.6 Yes</p> <p>4.7 See comments on accreditation</p> <p>4.8 No</p> <p>4.9 No. If the time is spent it must be paid for</p> <p>4.10 Proportionality should affect the time spent, not the rate of pay.</p> <p>4.12 Yes</p> <p>4.13 Yes</p> <p>4.14 Why should such cases pay a lower minimum – do they provide a lower level of justice that can be dealt with by experts with lower qualifications?</p> <p>4.16 Yes</p> <p>4.17 Only if the band still enables an 'expert' expert to be appointed if appropriate</p>
--	--

# Response to LSC Consultation

## Annex 3: Correspondence

	4.24 Yes
	Colin J Vogel BVetMed, MRCVS, MCIArb

<b>Private</b>	No
<b>From:</b>	"Molly Steiner" <molly.steiner@which.net>
<b>Date:</b>	Sat, 8 Jan 2005 19:28:07
<b>Message</b>	<p>Dear Chris</p> <p>I have scanned through your comments and broadly agree with them. I am probably part of a minority that is not a full time expert witness. I have on average about two cases a year consisting of about 5 hours work each. Up until recently my fee was £38 per hour which was very inexpensive. I have now raised this to £49 per hour which I think is still inexpensive. So far the solicitors have been happy with my work ( I currently have a case from the CPS in Brighton) and I am content to continue provided I can cover my costs.</p> <p>Accreditation would probably mean my withdrawal from this work since the extra costs and time would make it uneconomic for me to continue. If this was reflected with experts in a similar position then only those charging higher fees will be left.</p> <p>I think it will also make it difficult to find an expert in a field which is little called on by the courts.</p> <p>Hope this helps.</p> <p>Nick Steiner</p>

<b>Private</b>	No
<b>From:</b>	
<b>Date:</b>	Tue, 11 Jan 2005 10:51:40
<b>Message</b>	<p>"If an expert is criticised by a judge for his performance in Court a copy of the entire judgement should be sent to an appropriate Regulatory Body to consider if the expert is fit to practice or if his practice should be restricted as decided by the Body. It is important that the Body should have appropriate powers of investigation. This should include consideration of the opinion of the judge and whether or not the judge behaved competently in respect of, inter alia, his understanding of the medical evidence, his comparison of the weight of medical evidence including his reasons for preferring one opinion over another and finally his fairness in allowing any response or explanation to be heard in respect of what he considers to be a rejected opinion. The Regulatory Body shall have power to refer to the Lord Chancellor any instances in which it is clearly the deficiency of the judge which has caused the problem. Such a conclusion may be more common than the judiciary would like to admit. What is sauce for the goose is sauce for the gander. "</p> <p>Mr John S S Stewart Consultant General Surgeon 74 The Common Parbold Wigan WN8 7EA</p>

<b>Private</b>	No
----------------	----

## Response to LSC Consultation

### Annex 3: Correspondence

<b>From:</b>	Norman Lynagh <Norman@weather-consultancy.com>
<b>Date:</b>	Wed, 19 Jan 2005 11:18:38
<b>Message</b>	<p>Dear Dr Pamplin,</p> <p>I am largely in agreement with your views on the LSC proposals so I shall not waste everyone's time by going through them item by item. I would merely like to add a few comments.</p> <p>You make the suggestion of having staged instructions from solicitors. I fully support this. Indeed, in my experience this is normal practice in the larger cases I work on. It is a procedure that I actively encourage as it helps focus the investigation on the factors relevant to the case. The majority of my larger cases relate to marine casualties. My expertise lies in the fields of meteorology and related physical oceanography. At the start of an investigation it is often very unclear what are the relevant factors so it is sensible to start with a broad but shallow scope of work. As the investigation progresses and interim results are produced, the staged instructions narrow and deepen the scope of work.</p> <p>I strongly support the view that accreditation would best be carried out by the relevant professional bodies. In my case that is the Royal Meteorological Society. I have written to the Executive Director informing him of these developments and suggesting that it is an issue that the Society needs to consider. It may be that some form of expert witness accreditation could be an addition to their existing Chartered Meteorologist accreditation scheme.</p> <p>If expert witness fees in publicly funded civil cases were cut by 50 percent I can only imagine that this would deter some (many?) experts from accepting instructions in such cases. I would certainly find it a very big deterrent and would accept such instructions only in times of unusually low work load.</p> <p>In my expert witness work I am usually investigating some past weather event (e.g. the weather experienced by a ship during an oceanic voyage in which a number of containers were lost). To carry out this type of work I need to use a substantial amount of archived weather data. Extensive archives are maintained by various state meteorological services around the world, including the UK Met Office. While these archives are technically excellent the cost of extracting the relevant data from them for a case is very high and the response time is usually very slow. For each of those reasons I consider that these archives are far from ideal for expert witness work. Instead, I maintain my own worldwide archive of weather data which is added to daily. A huge amount of weather data is available in near-realtime via the Internet and specialist subscription services. This remains available for anything from 1 day to 2 weeks before being overwritten by new material. Therefore, if it is not captured in near-realtime the opportunity for capturing it is lost. This archive contains almost all of the data and computer products that I require for my work. I spend something approaching 1000 hours per year maintaining it. There is also a significant financial outlay involved. At present, when I carry out expert witness work I make no explicit data charge. Instead, my hourly rate (currently £115 plus vat) is set at a level that pays for my time and makes a contribution towards the cost of the archive. If I relied solely on purchasing data from external archives my hourly rate would be lower but I would have to pass on the cost of data purchase. Without doubt, the overall cost to the client would be significantly higher in almost all cases due to the very high data costs. If lower hourly rates are imposed on experts I would then be forced to counter this by making a separate charge for data. I cannot do my work without it and there is a significant cost involved in making it available irrespective of whether it is bought in from an external source or obtained from our internal sources. Also, at present I make no charge for cancelled meetings, cancelled court appearances etc. If lower fees are imposed then I would certainly tighten up on such matters.</p> <p>I am sure that many other experts have to invest substantial amounts of non-chargeable time merely to enable them to be in a position to carry out their expert witness work. If fees are squeezed too much, why should we bother? In my case, there are good fees to be had from consultancy work and there appears to be no shortage of work. The expert witness work has a much higher "hassle factor". If it does not command premium fee rates then it will quickly become unattractive to the true "experts" who will find higher fees in other activities. It seems inevitable to me that the average standard of "experts" providing expert witness services would then fall. If a premium service is wanted (and it should be) then that demands premium rates.</p>

# Response to LSC Consultation

## Annex 3: Correspondence

	<p>That's the law of the jungle.</p> <p>I hope these comments help.</p> <p>Best regards,</p> <p>Norman Lynagh Chartered Meteorologist Norman Lynagh Weather Consultancy 18 Kings Road Chalfont St Giles England tel: 01494 870220</p>
--	---

<b>Private</b>	No
<b>From:</b>	"Alastair Young" <acyoung@btconnect.com>
<b>Date:</b>	Thu, 20 Jan 2005 14:29:41
<b>Message</b>	<p>Dear Dr Pamplin</p> <p>I have already given support to the Register's response to the LSC proposals but I wish to emphasise 2 points-</p> <p><b>1</b> Para 5.10 of the consultation is really shocking! The Commission admits it has no data yet estimates it spent over £130 million on experts.</p> <p>The medical profession is under great pressure to practise <b>evidence-based</b> medicine. Surely the Government should practise evidence based legislation. Secondly if an expert made a statement in court in the terms of Para 5.10 I shudder to think of the Judge's and Counsel's response.</p> <p><b>2</b> The contribution of Medical Agencies to the escalating legal aid bill needs to be seriously examined. This must be one of the fastest growing fields in medico-legal work and I doubt if any expert likes the Agencies but I would disagree that doctors can control this because the profession will not act in unison to refuse Agency instructions. Why cannot the LSC refuse funding if Agencies are used?</p> <p>I hope this consultation paper can be thrown out.</p> <p>Regards</p> <p>Alastair Young</p>

<b>Private</b>	No
<b>From:</b>	David Shaw <ort6dls@yahoo.co.uk>
<b>Date:</b>	Mon, 14 Feb 2005 13:27:32
<b>Message</b>	<p>I wish to endorse the response of <i>UK Register of Expert Witnesses</i> which is clear and concise. I have particular concerns regarding accreditation of Medical Experts, the proposal to use the CRFP is not appropriate for most Medical experts in civil and criminal cases.</p> <p>DL Shaw Consultant Orthopaedic Surgeon</p>

Response to LSC Consultation

Annex 3: Correspondence

<b>Private</b>	No
<b>From:</b>	"Doug Cross" <maverick65@tiscali.co.uk>
<b>Date:</b>	Wed, 16 Feb 2005 21:00:09
<b>Message</b>	<p>Chris,</p> <p>I completed the survey form as requested, but have some thoughts about this issue that you may find of interest.</p> <p>I am a - or perhaps I should say <b>the</b> - forensic ecologist. I know of no other freelance experts in this field, which in fact I developed as a discipline many years ago. After 40 years working as an ecologist, then environmental consultant, on projects all over the world, I now get requests from lawyers for professional advice about their clients' problems - usually civil prosecutions, but sometimes criminal ones as well - that need someone with experience to clarify issues that they had been unable to solve themselves.</p> <p>In terms of personal expertise, there are few if any academics that I would accept to be qualified to judge my expertise or my performance as an expert. Those top professional (non-academic) experts with whom I have worked all recommend my services widely, so presumably I'm doing something right. But one of my professional institutes (the Institute of Biology) seems uninterested in the concept of an ecologist getting involved in crime, whilst the other - the European Biologists Association - seems to have virtually no reason for its existence other than to collect fees for professional accreditation, although to be fair to it, getting accredited is certainly a far more rigorous process than I have seen elsewhere.</p> <p>I was a Founder Member of the Society of Expert Witnesses, but due to a misunderstanding - I thought the Register was the same thing - my membership lapsed and I never got round to renewing it. Yet despite my lack of formal professional expert witness affiliation, this has not so far hindered my getting new instructions. These come through recommendations from past clients far more than through any entries in Expert Registers. Results get repeat work or new clients - if my work was shoddy then I wouldn't hear from any of my past clients again! Nor has my lack of attendance at the exorbitantly priced training courses for experts - as a pensioner I do not feel it appropriate to have eggs sucked before me!</p> <p>Most of my cases are as a defense witness when acting for farmers and businesses being prosecuted by the Environment Agency for polluting a watercourse or some such relatively minor offense. Some of them have indeed been guilty as charged, <b>but</b> - and it's a big 'but' - the evidence presented to the Courts is inevitably appallingly bad, and to permit such trials to proceed without a strong counter-defense would be to tolerate travesties of justice that I am not prepared to accept.</p> <p>On many occasions I have been able to force the prosecution to abandon evidence because its provenance was in doubt; samples submitted had been improperly taken, inadequate chains of evidence were available to verify their provenance; improper analytical techniques had been used; invalid conclusions drawn. And in many cases the selectivity of evidence has been so blatant that it was a simple matter to show the Court that equally valid alternative explanations could be postulated from the full range of the evidence, throwing doubt upon the merits of the prosecution's case. I know of no persons in my Professional Institutes capable of assessing whether or not I provided a maximally efficient service. All I can say is that my analyses and expert reports have been extremely effective - in most cases the prosecution has dropped charges or withdrawn evidence before the case actually came to trial. The situation is very similar when I act for a private prosecution - disputes are almost always settled out of court in my clients' favour, and it may well be that arbitration is more effective</p>

## Response to LSC Consultation

### Annex 3: Correspondence

	<p>than confrontation.</p> <p>And yet, despite repeatedly bloodying the nose of the Prosecution, I see that the Environment Agency persists in following the same pathway, over and over, without any evidence that its officers actually learn a single lesson about what evidence is and how it should be presented. And although I have been prepared to provide training for their staff, no one wants to know.</p> <p>Now if the example of the Environment Agency is representative of how official Expert Witnesses behave, then no system of official accreditation would appear capable of eliminating the enormous waste of Court time that such a vexatious approach to litigation represents. This is why I prefer the system as it is - since most of my cases do not reach the Court, the person who decides whether or not I am an effective and professional Expert is my instructing solicitor, not the Judge or some professional scoring chappie sitting at the back of the Court! None of my clients have money to waste, nor do I wish to waste my own time on trivial or doomed cases; when the latter do appear I tell the solicitor immediately it is apparent.</p> <p>I am concerned that there are no clear successors in my field of expertise, and that when I eventually do decide to hang up my suit my expertise is going to disappear. No amount of official accreditation will solve that problem, yet the recent proposal to set up Environmental Courts fills me with apprehension. Are we to expect the Environment Agency 'experts' to walk into these Courts with an air of competence and infallibility that will be unchecked by maverick ecological experts like me, who are familiar with their shoddy approach to evidence and inept presentation of selected factoids, and know how to deflate them? At present there are very very few ecological or environmental experts able to cope with the demand for new expertise in relevant fields that this proposed development would instigate - how many ecologists have even a nodding acquaintance with law? There is also no professional accreditation body that I can think of that would be capable of separating the competent scientists who can be trained as experts from the inept management staff and the younger plodding third-rate recruits that they are now deliberately hiring (yes, really. From inside the Agency I hear of a policy <b>not</b> to recruit the best biological applicants).</p> <p>No, leave it up to the solicitors to decide who is an expert. Keep the would-be regulators well out of the Courts, or they will indeed establish a hierarchy of bureaucrats susceptible to political pressures, and capable of deciding just which expert should be used in politically sensitive cases so that the 'correct' solution will be reached. It would undoubtedly result in the emergence of Professional Experts, known to and loved by the Establishment as being reliable and prepared to toe the right line. My work as a 'maverick' is aimed directly at the Court - it causes consternation when I suddenly move from one discipline to another, but it gets results and has prevented a number of serious miscarriages of justice.</p> <p>And yes, I am speaking from personal experience of political interference in such matters. I am currently a member of the Dept of Health's Committee on Toxicity sub-group investigating the 1988 Camelford aluminium sulphate poisoning incident. The political subversion of a supposedly independent committee has been persistent and remarkable, even to an old cynic like me. Highly discreditable 'experts' have been trotted out of the woodwork to put their politically correct two penn'orth of unsupportable scientific spin to the group. The same goes for the political and pseudoscientific spin provided by the Government's pet British Fluoridation Society over the illegal administration of an unlicensed medicine to the public.</p> <p>Courts are supposed to be free of political bias. I see no way, in today's climate of political control, that they will be properly served by having to appoint experts that have been carefully vetted by any official accreditation body that, whatever its credentials, cannot really be totally free from insidious political subversion. Even the</p>
--	--

Response to LSC Consultation

Annex 3: Correspondence

	<p>Royal Society was shown to suffer from this bias over the scandal of Dr Arpad Pusztai's work a couple of years ago.</p> <p>The more senior scientists are, the more vulnerable they are to pressure and innuendo - in the Camelford case we have had 16 years of it, and it's still evident, even as recently as this morning. As far as I am concerned the issue of my expertise and competence as an Expert Witness is entirely between my instructing solicitor and me. My record is my 'badge of office' and is open to public scrutiny at any time. I have overseas clients who appreciate independent expert advice - if accreditation becomes mandatory here, then I shall certainly take my skills out of the country, leaving the Environmental Courts to flounder as they will!</p> <p>Hope this is helpful.</p> <p>Regards</p> <p>Doug</p> <p>Doug Cross, Forensic Ecologist Tel (*44) (0) 1398 371305</p>
--	--

<b>Private</b>	No
<b>From:</b>	"John Gordon" <johngordon@ricsonline.org>
<b>Date:</b>	Fri, 18 Feb 2005 18:10:18
<b>Message</b>	<p>Dear Sirs,</p> <p>In response to the message below, I have submitted the questionnaire and also the follow up one about the responses to the LSC proposals.</p> <p>I feel rather strongly about this whole issue and today's obsession with paper qualifications, so thought that I should email you with my more extended thoughts in relation to the executive summary of the LSC paper. I will take the points in the order in which they occur in the paper.</p> <p><b>Quality:</b> Much depends on the type of accreditation. If, e.g., an RICS qualification is an accreditation, there is some argument, but it is not the whole story. I know some extremely competent surveyors who do not have an RICS qualification but who are utterly competent in a relatively narrow field. Their expertise would be valuable to a court as long as they keep within their expertise, understand that their duty lies to the court and recognise the need to be absolutely dedicated to searching for the truth. Such people would be excluded by any accreditation scheme.</p> <p>Graham Bennett is absolutely correct.</p> <p>You yourselves refer to training of experts. Expertise is a product of learning and experience. This is different from teaching. The trained expert may be moulded into a smooth style by (I will not name names) but the essence of a duty to the court and a search for truth are not improved by training as such. The slick performance of a 'professional expert' is less likely to impress the court than a truthful but less slick practitioner.</p> <p>The further danger of accreditation is the emergence, to a greater extent than even now, of those whose work as experts is a large proportion of their total workload. This has a number of disadvantages. Such people are less in touch with the day to day developments of life and practice and are more likely to be theorists. The lack of direct current experience is likely to weaken their expertise. There is a tendency for such people to be less able to meet the timetable required for a case. In my</p>



Response to LSC Consultation

Annex 3: Correspondence

	<p>experience there is a tendency for the 'professional expert' to be arrogant.</p> <p><b>Professional Bodies</b> Any member of the RICS, and many other professional bodies, is required to adhere to all five of the bulleted points for professional conduct. Those surveyors following the RICS practice note will certainly follow the five points.</p> <p><b>Science in the courtroom</b> I do not have experience of the criminal court, but it seems to me that the conflicting evidence in the Clark and Canning cases means that the findings <u>cannot</u> have been beyond reasonable doubt. In those circumstances the court <u>must</u> have been in error.</p> <p><b>Price</b> The proposal that interim reports are produced at first instance is eminently sensible. I have, on my own initiative, prepared brief interim reports, especially where the facts did not support the case that was being argued. This has kept costs to a minimum, and the instructing solicitors have been pleased.</p> <p>Because the expert is a seeker after truth, the brief report and the final one will reach similar conclusions, but with more detail and analysis of the facts and arguments.</p> <p>Lord Justice Auld is absolutely correct in all that he says in the quotation given.</p> <p>On the matter of differing fees for different types of case, this proposition is nonsense. An expert is bringing the same level of expertise and experience whatever the nature of the case. In less serious cases the time spent may be reduced but the rate should be the same. It is reasonable for the expert to have in mind the value of the dispute but his duty is still to the court, which will expect the same quality of evidence. In the colloquial phrase, if you pay peanuts you only get monkeys.</p> <p>Regards,</p> <p>John Gordon (gor88644)</p>
--	--

<b>Private</b>	No
<b>From:</b>	"alan harris" <alan_harris49@ntlworld.com>
<b>Date:</b>	Sat, 19 Feb 2005 23:50:25
<b>Message</b>	<p>Dear Editor</p> <p>One point which I did not previously cover was charges of experts.</p> <p>I am very concerned that if charges are reduced then the most competent in a profession will not bother to become involved in expert witnessing.</p> <p>In my field, run-of-the-mill, chartered civil engineers are charged out at rates of around £55.00/hr. Leaders in the profession such as partners of well established firms are charged out at £80 to £100/hr. I would not actually regard a "run-of-the-mill" engineer as suitable as an expert witnesses. If they have the presentation clarity, quick thinking ability at cross examination and the depth of knowledge of the subject they would already have been promoted to partner or director level.</p> <p>Reduced fees for civil/consulting engineers would seriously reduce the quality of expert advice to courts. I should add that many of the experts advising courts are of limited quality and reduced fees would make the court process even more of a lottery than the court process is at present.</p> <p>The practice of charging out at the person's normal rate seems to be the fairest method.</p> <p>Bearing in mind the trend towards the duty of the expert to the court not the</p>

Response to LSC Consultation

Annex 3: Correspondence

	<p>appointing legal team and for single joint experts it seems to me that the experts knowledge of his subject, his ability to explain his/her subject to to non experts and integrity are far more important aspect than the saving of fees.</p> <p>Many disputes hang on matters which can only be settled by experts so if the experts fees are not fully recoverable that increases the pressure on the litigant to minimise expert input and that can only reduce the chance of the court finding being correct.</p> <p>Solicitors and barristers are expensive (more so than experts) why not reduce their fees as well? The truth is that if one is looking for the truth then the more competent the participants the more likely the correct outcome will be achieved. Pay peanuts and get monkeys!</p> <p>Regards</p> <p>Alan Harris</p>
--	--

Response to LSC Consultation

Annex 3: Correspondence

---

***Correspondence received by post***

Response to LSC Consultation

Annex 3: Correspondence

---

**Professor R Langdon Hewer**

Telephone: 0117 9731323  
Fax: 0117 9733303  
e-mail: litfieldhouse@dial.pipex.com

Litfield House  
1 Litfield Place  
Bristol BS8 3LS

---

Our ref: RLH/VLB  
Your ref: JSP/U10891

1 February 2005

Dr C F Pamplin  
Editor  
UK Register of Expert Witnesses  
J S Publications  
PO BOX 505  
Newmarket  
Suffolk CB8 7TF

Dear Dr Pamplin

**RE: THE FUTURE OF EXPERT WITNESSES: THE LSC CONSULTATION PAPER**

Thank you very much for your letter of 3 December 2004. I have subsequently looked at the appropriate website and I have seen the very helpful material that you have put on.

I am a Consultant Neurologist and have been producing medico-legal reports for about 30 years. I have produced at least 2,500 reports during this time and I am currently producing about 100 new case reports annually, plus a number of supplementary and joint reports. My comments are written to you, particularly from the medical perspective.

**The medical perspective**

1. The number of doctors who are prepared to take medico-legal work is really rather small. This is certainly so in my own speciality of neurology.
2. Doctors working for the NHS are now under great pressure to meet governmental targets. One implication of this is that they simply do not have the time to undertake medico-legal work. The new NHS contract terms are also relevant here. It may be thought desirable for medical expert witness to be in active practice. However, this is becoming increasingly difficult to achieve. Any proposal to make medico-legal work less attractive from the experts point of view is likely to make the situation worse.
3. Much medico-legal work is undertaken by people who have retired from the NHS. In many instances this does not seem to matter – particularly as the event under consideration often occurred some years ago. It is obviously very important that retired doctors should keep themselves professionally up to date.
4. It is already true that legally funded work is financially less well paid than that undertaken for insurers.
5. A further problem is that legally funded cases not only have a financial cap, but also frequently remain unpaid until the case is settled.
6. For the above, and other, reasons – publicly funded work, from the experts point of view, is a good deal less attractive than other medico-legal work.
7. The situation described above is unfair/unjust to claimants. It means that some experts are not willing to undertake publicly funded work and this means that the pool

## Response to LSC Consultation

### Annex 3: Correspondence

---

of experts available for publicly funded claimants is reduced. There is also the possibility that the best experts have more than enough medico-legal work and are not necessarily looking for extra work. Again, this applies particularly to the 'best' experts.

8. I think it is important, from many points of view, that publicly funded expert work is properly paid and the level of remuneration should not be far below that available for non-publicly funded work.

#### **Accreditation**

9. Many experts have achieved a limited degree of accreditation. Their references have been taken up by the Law Society.
10. I, and many others, do not see how there can be any major expansion of the accreditation procedures. What method of doing this is proposed? It seems to me that the likelihood is that accreditation will be on the basis of fees – the lower the fees charged the more likely it is that the expert will get accredited! This would be a hopeless way of proceeding.
11. It is surely up to the barristers on the other side to challenge the credentials of an expert witness if this is thought to be appropriate.
12. It has been suggested that accreditation should be granted by an appropriate professional body. Once again, I cannot really see how this is to be achieved.

#### **Final comments**

13. Medico-legal work is becoming increasingly demanding and time consuming. From my own point of view it sometimes involves not only me seeing the claimant, but also going through hundreds of pages of records. A tight timetable is often imposed.

Those of us involved in medico-legal work are most grateful to you for highlighting the various issues and for preparing a response to the proposals produced by the Legal Services Commission.

With kind regards.

Yours sincerely

**R Langton Hewer**

Response to LSC Consultation

Annex 3: Correspondence

---

Mr P Ramsay-Baggs, FDS. FFD. FRCS.  
Consultant Oral Surgeon  
Newry and Mourne Health and Social Services Trust  
Daisy Hill Hospital  
Oral Surgery Department 028308351386

Dictated 27 January 2005  
Typed 2 February 2005

Dr C F Pamplin  
Editor – UK Register of Expert Witnesses  
JS Publications  
PO Box 505  
Newmarket  
Suffolk  
CB8 7TF

Dear Dr Pamplin

Thank you for your letter informing of the LSC's attempt to reduce expert fees in publicly funded civil cases.

First of all I note this only applies to England and Wales and it is interesting you have written to me in Northern Ireland. However, I am sure what happens in England this year will happen over here next year.

I must say I am delighted to hear that the excessive fees charged by some of my colleagues are going to be curbed, and I think this is an excellent move on behalf of the LSC. Furthermore many of my colleagues undertake such work during their contracted time within the NHS, something which I think is deplorable and I am delighted to see that the new contract means they will have to forward such fees to their employer.

I have been constantly and frequently embarrassed by the level of fees charged by some of my colleagues, which are grossly disproportionate to the amount of time and their value.

I would also suggest that many of the fees charged by barristers and solicitors are equally disproportionate and that the whole system needs to be completely reformed and as the public are often the butt of what can only be described as legalised extortion in many cases I think this is to be applauded and that it is right and we should be applauding such steps.

Even if fees are cut by 50% some of my colleagues will be charging more for half a day than I earn in a week working for the NHS and I really don't think this situation can be justified. I am glad somebody has decided to do something about it.

Yours sincerely,

**Mr P Ramsay-Baggs, FDS. FFD. FRCS.**